rvice and receipt of a copy of the within is hereby admitted

_____day of June, 1929.

_____

Counsel for Petitioner.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 99

ROBERT H. LUCAS, AS COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

GUY C. EARL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 29, 1929
CERTIORARI GRANTED OCTOBER 14, 1929

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 99

ROBERT H. LUCAS, AS COMMISSIONER OF INTERNAL REVENUE, PETITIONER

VS.

GUY C. EARL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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1 Before U. S. Board of Tax Appeals

Docket 7873

GUY C. EARL, 2914 McCLURE ST., OAKLAND, CALIF., PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

For the taxpayer: H. H. Tooley, Esq.; Warren Olney, jr., Esq.; J. M. Mannon, jr., Esq.; Henry D. Costigan, Esq.; Wm. G. Feely, Esq.

For the commissioner: M. E. McDowell, Esq.; V. J. Hefferman, Esq.

Docket entries

1925

Oct. 7—Petition received and filed.
Oct. 12—Copy of petition served on solicitor.
Oct. 12—Notification of receipt mailed taxpayer.
Oct. 29—Answer filed by solicitor.
Nov. 10—Copy of answer served on taxpayer. Assigned to field calendar.

1927

May 6—Hearing date set July 8, 1927, at San Francisco, Calif.
2 July 8—Hearing had before Mr. Trammell. Briefs due Sept. 15/27.
Aug. 8—Motion for an extension to 10–15–27 to file brief filed by taxpayer.
Aug. 9—Granted. Both sides notified.
Aug. 23—Transcript of hearing 7–8–27 filed.
Oct. 13—Brief filed by taxpayer.
Oct. 13—Brief filed by G. C.

1928

Feb. 14—Findings of fact and opinion rendered (Trammell). Judgment will be entered for the commissioner.
Feb. 16—Order of redetermination entered.
Aug. 1—Supersedeas bond for $9,705.16 approved and ordered filed.
Aug. 1—Notice of withdrawal of Homer H. Tooley as counsel for taxpayer filed.
Aug. 1—Notice of appearance of Warren Olney, jr., J. M. Mannon, jr., and Henry D. Costigan as counsel for taxpayer filed.
Aug. 2—Petition for review by U. S. Cir. Ct. of Appeals, 9th Circuit, with assignment of errors filed by taxpayer.
Aug. 2—Statement of evidence lodged.
Aug. 2—Proof of service of petition filed.
Aug. 2—Proof of service of statement for hearing 8–13–28 filed.
Aug. 8—Objections to statement of evidence and notice of service filed by G. C.

Aug. 9—Hearing continued to 8-21-28 on settlement of evidence.

3 Aug. 21—Hearing had before Mr. Trammell. Order rejecting settlement of evidence as proposed by petitioner.

Sept. 12—Order denying inclusion of statement of evidence entered.
Sept. 12—Exception to order denying inclusion of statement entered.
Sept. 12—Præcipe with proof of service thereon filed by taxpayer.
Sept. 13—Consent to taxpayer's præcipe filed by G. C.

Now, September 24, 1928, the foregoing docket entries certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, Board of Tax Appeals.

Before United States Board of Tax Appeals

Petition

Filed Oct. 7, 1925

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:PA:4-GWF-406-60D) dated August 10, 1925, and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual residing at 2914 McClure Street, Oakland, California.

4 2. The deficiency letter was dated August 10, 1925.

3. The taxes in controversy are income taxes for the calendar years 1920 and 1921 and are less than $10,000.00.

4. The determination of tax contained in said deficiency letter is based upon the following errors:

The commissioner maintains that a joint tenancy agreement entered into between the taxpayer and his wife in 1901 does not extend to salaries, wages and commissions earned by him individually, but that such income is his separate income and should be reported on his return for income tax purposes. Any such income, the commissioner holds, assigned to his wife, partakes of the nature of a gift.

5. The facts upon which the taxpayer relies as the basis of his appeal are the following:

Under date of June 1, 1901, the taxpayer and his wife, Ella F. Earl, executed a certain contract in writing in the words and figures as follows:

OAKLAND, *June 1, 1901.*

It is agreed and understood between us that any property either of us now has or may hereafter acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise, or inheritance, and all the proceeds, issues, and profits of

any and all such property shall be treated and considered and
5 hereby is declared to be received, held, taken, and owned by us as joint tenants and not otherwise with the right of survivorship.

GUY C. EARL.
ELLA F. EARL.

The said agreement has ever since the date thereof been and still is in full force and effect. There was ample consideration for the agreement. The wife, at the time the agreement was executed, had upwards of $30,000.00 of separate property which she put under the agreement. There was also community property existing at the time and each party had an expectancy of inheritance, etc. The taxpayer had no separate property. Under the California law no consideration was necessary for the complete and absolute validity of the agreement other than the mutual consent of the parties to such agreement. Even had neither of the contracting parties any separate property, or there had been no community property in existence, it was entirely competent for the parties to make a valid agreement on their mutual consent, unsupported by any other consideration. If such an agreement amounted to a gift by one spouse to the other, it would be perfectly valid and would control with respect to present property and all future properties, whether arising by earnings or otherwise. The future earnings upon the instant of coming into being would be controlled by the agreement. There would be no instant of time when they could be considered as belonging to the husband before the agreement would take effect.

6 Such is the clear meaning of the California law. The parties were resident in California and have ever since lived in California, the earnings were made in California, and the agreement has remained in effect during the taxable years under review.

In the year 1920 the taxpayer received as salary, fees, etc., the sum of $24,839.00, which, under the joint tenancy agreement of June 1, 1901, belonged $12,419.50 to himself and $12,419.50 to his wife. In the year 1921 he received from the same sources the sum of $22,946.20, of which $11,473.10 belonged to himself and $11,473.10 to his wife.

6. The taxpayer in support of his appeal relies upon the following propositions of law:

(a) Section 161 of the California Civil Code, which provides that a husband and wife may hold property as joint tenants, tenants in common, or as community property.

(b) Sections 158 and 159 of the California Civil Code, which provides that a husband and wife may create the joint tenancy by contract between themselves.

(c) IT: 1744–II–2CB–179, wherein the Treasury Department held that under the laws of California a husband and wife may enter into a partnership and if there is an agreement which shows that the intention of the parties is to create in the wife a vested interest

in the partnership as her separate property, such an agreement will change their property from community to separate property, and in such a case the wife is entitled to report as her separate income all amounts earned by her under such agreement.

7 Wherefore the taxpayer respectfully prays that this board may hear and determine his appeal.

HOMER H. TOOLEY,
Certified Public Accountant for Taxpayer,
514 Crocker Building, San Francisco, California.
FRANK G. BUTTS,
Certified Public Accountant for Taxpayer,
910–912 Investment Building, Washington, D. C.

[*Duly sworn to by Guy C. Earl; jurat omitted in printing.*]

8 TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, August 10, 1925.

IT:PA:4. GWF–406–60D.

Mr. GUY C. EARL,
2914 McClure Street, Oakland, California.

SIR: The determination of your income-tax liability for the taxable years 1920 and 1921, as set forth in office letter dated May 1, 1925, has been changed as a result of your protest to disclose an aggregate deficiency in tax amounting to $4,852.58. The adjustments made are shown in detail in the attached statement.

In accordance with the provisions of section 274 of the revenue act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with

9 the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:4–GWF–406–60D. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR, *Commissioner.*
By J. G. BRIGHT (Sgd.),
Deputy Commissioner.

STATEMENT

IT:PA-4.
GWF-406-60D.
In re Mr. Guy C. Earl, 2914 McClure St., Oakland, California.

Year	Deficiency in tax
1920	$2,420.12
1921	2,432.46
Total	4,852.58

A reaudit of your returns for the years 1920 and 1921 has been made based on your protest and the recommendations of the conferee in a conference held in this office in June 9, 1925.

1920

10 In view of the information submitted, relative to the agreement between yourself and wife, the income received from transactions in which you were joint tenants has been eliminated from your net income and included in your wife's return.

Salaries, wages, and commissions earned by you individually are deemed to be your separate income, and such income has been included in your return. Any such income assigned to your wife is in the nature of a gift.

Tax paid at source, amounting to $33.00, previously included in your income, has been eliminated in accordance with the provisions of Treasury Decision 3685.

Your total income adjusted is $32,393.68. Of this amount $3,777.34 has been included in your wife's return and $28,616.34 in your return.

The tax on your income is $3,492.53, and the additional tax liability is $2,420.12.

Statement—Mr. Guy C. Earl—1921

Your total net income of $24,124.86, previously reported, was understated by $1,000.00, the correct amount being $25,124.86. Of this amount $24,035.53 has been included in your return, and $1,089.33 eliminated and included in your wife's return, in accordance with the recommendations of the conferee.

The correct tax liability on your income of $24,035.53 is $2,535.41, and the additional tax liability is $2,432.46.

11 You are advised that in determining this tax liability personal exemption allowable on your return has been increased from $1,000.00 to $2,000.00, inasmuch as the income of your wife for this year is nontaxable.

This assessment is in addition to all other unpaid and outstanding assessments appearing upon the collector's lists.

Payment of the deficiency in tax should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

You will be advised of the adjustments in your wife's net income in a separate communication from this office.

Now, August 24, 1928, the foregoing petition certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Answer

Filed Oct. 29, 1925

Now comes the Commissioner of Internal Revenue, by his
12 attorney, A. W. Gregg, Solicitor of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) Admits the allegations set forth in paragraphs 1, 2, and 3 of the petition.

(2) Admits that during the year 1920 taxpayer received salaries, fees, etc., amounting to $24,839.00.

(3) Admits that during the year 1921 taxpayer received salaries, fees, etc., amounting to $22,946.20.

(4) Admits that in determining the deficiency tax set forth in said deficiency letter dated August 10, 1925, the commissioner treated the amounts set forth in paragraphs 2 and 3 of this answer as taxpayer's separate income.

(5) Denies that the commissioner erred in treating the said amounts of $24,839.00 and $22,946.20 as taxpayer's separate income.

(6) Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Proposition of law: In reporting income subject to taxation an individual may not reduce the amount of salaries, wages, fees, etc., received by him during a taxable year by an agreement or contract to pay over any amount thereof to another person.

Wherefore it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

13 Of Counsel:
ARTHUR H. MURRAY,
Special Attorney,
Bureau of Internal Revenue.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

Docket No. 7873. Promulgated February 14, 1928

GUY C. EARL, PETITIONER,

VS.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Findings of fact and opinion

Salary and fees of petitioner, a resident of California, are taxable to him notwithstanding the fact that he had agreed to divide them with his wife.

H. H. Tooley, Esq., for the petitioner.

M. E. McDowell, Esq., for the respondent.

This is a proceeding for the redetermination of deficiencies in income tax for the calendar years 1920 and 1921 in the amounts of $2,420.12 and $2,432.46, respectively. The deficiencies arise on
14 account of the action of the respondent in including in the taxable income of the petitioner the entire amount received by him during the years involved from salaries, fees, etc.

FINDINGS OF FACT

The petitioner is a resident of California. On June 1, 1901, he entered into a contract in writing with his wife, Ella F. Earl, as follows:

"It is agreed and understood between us that any property either of us now has or may hereafter receive or acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise or inheritance, and all the proceeds, issues and profits of any and all such property shall be treated and considered and hereby is declared to be received, held, taken and owned by us as joint tenants and not otherwise with the right of survivorship.

"(Signed) GUY C. EARL.
"ELLA F. EARL."

The above agreement has been in effect since the date thereof and all amounts received by the petitioner as income from personal services, consisting of salaries, fees, etc., as well as the income from property, have been deposited in a joint bank account.

The petitioner and the said Ella F. Earl were married in 1888. In 1901 the petitioner had accumulated considerable property,
15 consisting of cash, bonds, lands, and other property. The petitioner's wife had about $30,000 worth of property when they entered into the agreement above set out. At the time the petitioner was not very well and suggested to his wife that it might be

wise for them to enter into such an agreement, which would simplify affairs in case he died during her lifetime, and that "it would take care of her and leave the matter for her administration."

At approximately the same time the contract was entered into the joint bank accounts were made.

The petitioner's salary as an officer of the Great Western Power Company and fees received as an attorney were deposited in these joint accounts immediately upon receipt thereof. Mrs. Earl has at all times had the right to draw against the accounts at will.

In the year 1920 the petitioner received as salary, feet, etc., the sum of $24,839.00, and in the year 1921 he received from the same sources $22,946.20.

The petitioner included only one-half of the above amounts as being his taxable income in his income-tax returns for the years involved. The respondent determined that the entire amount of such income was taxable to the petitioner and that no part thereof was taxable to the wife.

OPINION

TRAMMELL: In determining the deficiencies here involved the respondent gave effect to the agreement set out in the findings of fact in so far as income from property was concerned, holding that
16 one-half of the amounts received from such sources was taxable to the petitioner's wife, but held that the entire amounts of $24,839 and $22,946.20, received in 1920 and 1921, respectively, as salary, fees, etc., were taxable to the petitioner.

It was contended, in view of the contract entered into in 1901, that one-half of the above amounts should be taxable to the petitioner's wife upon the ground that it became her income upon its receipt by the petitioner.

The petitioner in his brief cites many cases to the effect that husband and wife may by contract change the character of their property from community to separate property; that is, the husband and wife may enter into an agreement that the earnings of the wife may be her separate property. Authorities are also cited to the effect that under the California law a contract such as set out above constituted an equitable assignment of future earnings.

We have no disagreement with the authorities cited by the petitioner. It may be conceded that under the law of California the petitioner's wife had a right under the contract to receive one-half of her husband's earnings, but this was at most an assignment of a portion of the petitioner's earnings. As between the parties the contract may be perfectly legal and enforceable. He might have been compelled to turn over to his wife one-half of the earnings, but the salary and fees involved here first became his earnings. In the case of Blair vs. Roth, decided by the Circuit Court of Appeals, Ninth Circuit (not yet reported), the court held that an
17 agreement such as this did not have the effect of preventing the earnings from becoming community property. The earn-

ings are taxable to the petitioner when received. (U. S. vs. Robbins, 269 U. S. 315.)

In view of the foregoing, it is our opinion that the amounts received by the petitioner as salary, fees, etc., should be taxable to him.

Reviewed by the board.

Judgment will be entered for the respondent.

Milliken concurs in the result.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals, Washington

Docket No. 7873

GUY C. EARL, PETITIONER, VS. COMMISSIONER OF INTERNAL REVENUE, respondent

Order of redetermination

Pursuant to the board's findings of fact and opinion, promulgated February 14, 1928, it is ordered and decided that, upon redeter-
18 mination, there is deficiency for the years 1920 and 1921 in the amounts of $2,420.12 and $2,432.46, respectively.

(Signed) CHARLES M. TRAMMELL,
Member United States Board of Tax Appeals.

Dated Washington, D. C., ————.

Entered Feb. 16, 1928.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

[Title omitted.]

Notice of withdrawal of counsel

Filed Aug. 1, 1928

The undersigned, Homer H. Tooley, hereby gives notice of his withdrawal as counsel for petitioner in the above-entitled proceeding.

Dated at San Francisco, California, July 21, 1928.

HOMER H. TOOLEY.

19 Receipt of service of copy of the above and foregoing notice of withdrawal of counsel is hereby acknowledged this 1st day of August, 1928, at 2.30 p. m.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

[Title omitted.]

Notice of appearance of counsel

Filed Aug. 1, 1928

The undersigned, Warren Olney, Jr., J. M. Mannon, Jr., and Henry D. Costigan, hereby give notice of their appearance as counsel for petitioner in the above-entitled proceeding, in the place
20 and stead of Homer H. Tooley, and hereby designate as their mailing address 1500 Balfour Building, San Francisco, California.

Dated at San Francisco, California, July 23, 1928.

WARREN OLNEY, Jr.
J. M. MANNON, Jr.
HENRY D. COSTIGAN.

Receipt of service of copy of the above and foregoing notice of appearance of counsel is hereby acknowledged this 1st day of August, 1928, at 2.30 p. m.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Certificate to foregoing paper omitted in printing.]

In United States Circuit Court of Appeals, Ninth Circuit

GUY C. EARL, PETITIONER AND APPELLANT, VS. DAVID H. BLAIR, Commissioner of Internal Revenue, respondent and appellee

21 *Petition for review of decision of the United States Board of Tax Appeals*

Filed Aug. 2, 1928

To the honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Guy C. Earl, the above-designated petitioner and appellant (hereinafter called petitioner) and files this petition for the review of the decision, findings of fact, and opinion of the United States Board of Tax Appeals rendered and promulgated on the 14th day of February, 1928, and the order of redetermination of said board entered on the 16th day of February, 1928, approving and redetermining deficiencies in income taxes of the petitioner for the calendar years 1920 and 1921 in the respective amounts of $2,420.12 and $2,432.46; and your petitioner respectfully shows:

STATEMENT OF THE NATURE OF THE CONTROVERSY

1. The said respondent and defendant in error above designated (hereinafter called respondent) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States of America.

2. Petitioner made his returns of income taxes with respect to his income for the years 1920 and 1921 to the collector of internal revenue at San Francisco, California. Petitioner is now and was during said years and at the respective times of making said returns,
22 and at all other times herein mentioned, an inhabitant of the city of Oakland, in the county of Alameda and State of California.

3. Pursuant to the provisions of sections 273 and 274 of Title II of the revenue act of 1924 said respondent, as such Commissioner of Internal Revenue, determined deficiencies in the taxes of petitioner for the said years 1920 and 1921, and on the 10th day of August, 1925, mailed a notice of said deficiencies to said petitioner; thereafter, to wit, on or about the 8th day of October, 1925, pursuant to section 274 of said Title II of said revenue act of 1924, petitioner filed a verified appeal petition with the United States Board of Tax Appeals wherein petitioner appealed from the determination by the said respondent of the said deficiencies.

4. In and by said appeal petition filed with said board petitioner alleged as follows:

That petitioner was at the time of filing said petition an individual residing in Oakland, California; that under date of June 1, 1901, petitioner and his wife, Ella F. Earl, executed a certain contract in writing in the words and figures as follows:

OAKLAND, *June 1, 1901.*

It is agreed and understood between us that any property either of us now has or may hereafter acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise, or inheritance, and all the proceeds, issues, and profits of any and all such property shall be treated and considered and hereby is
23 declared to be received, held, taken, and owned by us as joint tenants and not otherwise with the right of survivorship.

GUY C. EARL.
ELLA F. EARL.

That said agreement had ever since the date thereof been and still was at the time of filing said petition in full force and effect; that there was ample consideration for the agreement in that petitioner's said wife, at the time the agreement was executed, had upwards of $30,000 of separate property which she put under the agreement; that there was also community property existing at the time, and each party had an expectancy of inheritance; that petitioner had no separate property; that petitioner and his said wife were resident in California at the time when said agreement was executed and have ever since lived in California; that the agreement was in effect during the taxable years 1920 and 1921; that in the year 1920 petitioner received as salary, fees, and other earnings,

made in California, the sum of $24,839.00, which under the joint tenancy agreement of June 1, 1901, belonged $12,419.50 to himself and $12,419.50 to his wife; that in the year 1921 petitioner received from the same sources the sum of $22,946.20, of which $11,473.10 belonged to himself and $11,473.10 to his wife under said agreement; that the Commissioner of Internal Revenue, respondent herein, contended and held that the said agreement between petitioner and his wife did not extend to salary, wages, and commissions earned by him individually, but that all of such salaries, wages, and commissions were the separate income of petitioner and should have been reported on his return for income-tax purposes; wherefore the said petitioner prayed that said United States Board of Tax Appeals would hear the proceeding and determine his appeal.

5. Thereafter, on or about the 29th day of October, 1925, respondent filed with said Board of Tax Appeals his answer to the said petition, which answer admitted that petitioner was an individual residing in Oakland, California; that during the year 1920 petitioner received salary, fees, etc., amounting to $24,839.00; that during the year 1921 the petitioner received salary, fees, etc., amounting to $22,946.20; that in determining the deficiency set forth in said deficiency letter dated August 10, 1925, the commissioner treated all of said amounts of $24,839.00 and $22,946.20 as the separate income of petitioner, and denied that the commissioner erred in said treatment and denied generally and specifically each and every other allegation contained in petitioner's petition on appeal.

6. The cause, being then at issue under the rules and practices of said board, duly came on for hearing on the 8th day of July, 1927, at which time petitioner submitted documentary evidence and the testimony of competent witnesses in support of the allegations of his said petition on appeal, which said documentary evidence and testimony were received in evidence by said board. At the conclusion of said hearing petitioner moved for judgment in his favor in the proceeding, and said motion was formally denied. Thereafter, on February 14, 1928, said board rendered a decision wherein said board set forth its findings of fact in substantial accordance with the facts as alleged in the petition and as hereinbefore set forth, together with an opinion in which it was held as a matter of law that all of the said earnings of petitioner amounting to $24,839.00 for the year 1920 and $22,946.20 for the year 1921 were taxable income to the petitioner. On February 16, 1928, said board entered its final order of redetermination approving and redetermining the deficiencies for the years 1920 and 1921 in the amounts of $2,420.12 and $2,432.46, respectively.

DESIGNATION OF COURT OF REVIEW

Petitioner is, and was at all times herein mentioned an inhabitant of the State of California, residing in the city of Oakland, in the county of Alameda, in said State, and being aggrieved by the said

decision, findings of facts, opinion, and order of said board, desired that the same be reviewed in accordance with law by the United States Circuit Court of Appeals for the Ninth Circuit.

ASSIGNMENT OF ERROR

Petitioner, as a basis for review, assigns the following errors which, he avers, occurred upon the hearing of said cause by the United States Board of Tax Appeals and in the decision, findings of fact, and opinion of said board therein, and in the order of
26 redetermination rendered, given, and made in said cause, and upon which errors he relies to reverse said decision and order of redetermination, to wit:

1. The said board erred in denying at the hearing of said cause the motion for judgment made by petitioner.

2. The said board erred in rendering its decision for respondent herein.

3. The said board erred in determining that there were deficiencies in the taxes of petitioner for the years 1920 and 1921 in the amounts of $2,420.12 and $2,432.46, respectively, or in either of said amounts, or in any amount or amounts at all.

4. The said board erred in holding that the agreement dated June 1, 1901, between petitioner and his wife, Ella F. Earl, found by said board to have been duly made and to be fully in effect, did not make one-half of petitioner's earnings for each of the years 1920 and 1921 taxable income of said Ella F. Earl, but that all of said earnings were the taxable income of petitioner in spite of said agreement.

5. The said board erred in holding that the agreement dated June 1, 1901, between petitioner and his wife, Ella F. Earl, found by said board to have been duly made and to have been fully in effect, did not make petitioner's earnings for each of the years 1920 and 1921 joint taxable income to petitioner and said Ella F. Earl, so that each was taxable upon one-half thereof, but that all of said earnings were the taxable income of petitioner in spite of said agreement.

27 6. The said board erred in holding that petitioner and his said wife, although resident in California, could not by agreement change the status of earnings or other future income from community to separate income of said wife, upon which she alone would be taxable.

7. The said board erred in holding that petitioner and his said wife, although resident in California, could not by agreement change the status of earnings or other future income from community income to joint income, upon one-half of which said wife alone would be taxable.

8. The said board erred in holding that the income of petitioner and his wife, which petitioner and his wife agreed by written agree-

ment validly in effect between them should be joint property simultaneously with its receipt, was either not such joint property, or if joint property was nevertheless taxable wholly to petitioner and not one-half to his said wife.

Wherefore the above-named petitioner herein prays that the United States Circuit Court of Appeals for the Ninth Circuit review the action of said United States Board of Tax Appeals in this cause and reverse said decision and order of redetermination of said board, and direct the entry of a decision and order by said board in favor of the petitioner determining that there is no deficiency in income taxes due from petitioner for either of the years 1920 or 1921, and that the clerk of the said board be directed to transmit and
28 deliver to the clerk of said court certified copies of each and all of the documents necessary and material to the presentation and consideration of the foregoing petition for review and as required by the rules of said court and by law, and for such other and further relief as may to this court appear proper in the premises.

And your petitioner will ever pray.

GUY C. EARL,
Petitioner and Appellant.

WARREN OLNEY, JR.,
J. M. MANNON, JR.,
HENRY D. COSTIGAN,
Attorneys for Petitioner and Appellant,
1500 Balfour Building, San Francisco, California.

[*Duly sworn to by Guy C. Earl; jurat omitted in printing.*]

29 [Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

[Title omitted.]

Notice of filing of petition for review

Filed Aug. 2, 1928

To C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Washington, D. C.,
Attorney for Respondent.

SIR: Please take notice that on the 2d day of August, 1928, the undersigned presented to the United States Board of Tax Appeals, and filed with the clerk thereof, the petition of Guy C. Earl, a copy of which is annexed hereto for the review, by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision, findings

of fact, and opinion of said board in the above-entitled pro-
30 ceeding rendered and promulgated on the 14th day of Febru-
ary, 1928, and the order of redetermination of said board entered in the said proceeding on the 16th day of February, 1928.

Dated Washington, D. C., August 2d, 1928.

WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
HENRY D. COSTIGAN,
Attorneys for Petitioner and Appellant,
1500 Balfour Building, San Francisco, California.

Receipt of service of copy of the above and foregoing notice and copy of petition for review in the above proceeding is hereby acknowledged this 2d day of August, 1928.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Certificate to the foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

[Title omitted.]

31 *Order denying inclusion of statement of evidence in transcript*

The petitioner herein having filed a petition for review of the decision of the board by the Circuit Court of Appeals for the Ninth Circuit and having lodged for the approval of the board a proposed statement of evidence to be included in the record for review, and the respondent having objected to the inclusion in the record for review of any statement of evidence, a hearing before the board was held on August 21, 1928, pursuant to notice duly served upon the respective attorneys.

It appearing to the board that the petitioner, in his petition for review, has assigned no error with respect to the admission or rejection of evidence or to the effect that any finding of the board is unsupported by any evidence, and has assigned error only with respect to the legal conclusions of the board based upon findings of facts which are not put in issue in the appellate proceeding, and it further appearing to the board that the petitioner, in his petition for review, recites that the "board rendered a decision wherein said board set forth its findings of fact in substantial accordance with the facts as alleged in the petition and as hereinbefore set forth," the board having heard arguments of counsel and being of the opinion that a statement of evidence is not essential to a decision of the questions

raised by the appeal and is not properly a part of the record
32 for review in this appeal prepared in accordance with the rules of the Circuit Court of Appeals for the Ninth Circuit, it is

ORDERED that no statement of evidence shall be included in the transcript of record for review to be certified herein to the Circuit Court of Appeals for the Ninth Circuit.

Dated at Washington, D. C., this 12th day of September, 1928.

C. M. TRAMMELL,
Member, U. S. Board of Tax Appeals.

Approved as to form.

VOGELSANG, BROWN, CRAM & FEELY,
By WM. G. FEELY.

[Certificate to foregoing paper omitted in printing.]

Before United States Board of Tax Appeals

[Title omitted.]

33 *Exception to order denying inclusion of statement of evidence in transcript*

Be it remembered that the petitioner herein duly lodged his proposed statement of evidence with this board, to which respondent entered his objection, and hearing therein was had before the board on August 21, 1928.

Whereupon the board made its order as follows:

"ORDERED that no statement of evidence shall be included in the transcript of record for review to be certified herein to the Circuit Court of Appeals for the Ninth Circuit."

To said order petitioner then and there duly noted his exception upon the ground that petitioner is entitled to carry up a complete record of the case and that the same is indispensable to a proper presentation of petitioner's case to the Circuit Court of Appeals for the Ninth Circuit.

Dated at Washington, D. C., this 12th day of September, 1928.

C. M. TRAMMELL,
Member, U. S. Board of Tax Appeals.

[Certificate to foregoing paper omitted in printing.]

34 *Before United States Board of Tax Appeals*

[Title omitted.]

Præcipe for record

Filed September 12, 1928

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, and within sixty days from the date of the filing of the petition for review in the above-stated cause transmit to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the above-entitled cause.

2. The petition on appeal to the Board of Tax Appeals, including the exhibit thereto attached, consisting of letter from the Commissioner of Internal Revenue to Mr. Guy C. Earl, dated August 10, 1925, and notifying said Guy C. Earl of deficiencies in taxes with attached statements.

3. The answer of the Commissioner of Internal Revenue to said petition.

35 4. The order of the board denying inclusion of statement of evidence in transcript.

5. The exception of petitioner to order of the board denying inclusion of statement of evidence in transcript.

6. The decision of the board promulgated February 14, 1928, consisting of findings of fact and opinion.

7. The order of redetermination of the board entered February 16, 1928.

8. The withdrawal of Homer H. Tooley as counsel for petitioner.

9. The appearance of Warren Olney, jr., J. M. Mannon, jr., and Henry D. Costigan as counsel for petitioner.

10. The petitioner for review filed on August 2, 1928.

11. The original notice of filing petition for review, showing service of petition and notice on counsel for respondent.

12. This præcipe for the record.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 12th, 1928.

WARREN OLNEY, Jr.,
J. M. MANNON, Jr.,
HENRY D. COSTIGAN,
Counsel for Petitioner.

36 Receipt of service of copy of the above and foregoing præcipe for the record is hereby acknowledged this 12th day of September, 1928.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent.

[Certificate to foregoing paper omitted in printing.]

37 In United States Circuit Court of Appeals, Ninth Circuit

38 [Minute entry of argument and submission Feb. 14, 1929, omitted in printing.]

39 In United States Circuit Court of Appeals

GUY C. EARL, PETITIONER
vs.
COMMISSIONER OF INTERNAL REVENUE, respondent
No. 5602

Order directing filing of opinion and filing and recording of judgment

Feb. 25, 1929.

By direction of the honorable Frank H. Rudkin and Frank S. Dietrich, Circuit Judges, and Robert S. Bean, District Judge, before whom the cause was heard, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

40 In United States Circuit Court of Appeals, Ninth Circuit

GUY C. EARL, APPELLANT
vs.
COMMISSIONER INTERNAL REVENUE, appellee
No. 5602

Upon petition to review an order of the United States Board of Tax Appeals.

Before RUDKIN and DIETRICH, Circuit Judges, and BEAN, District Judge.

Opinion

Filed Feb. 25, 1929

BEAN, District Judge: This is a petition for review of a decision of the Board of Tax Appeals. (Sec. 1001, revenue act of 1926.) The petitioner is and was during the times hereinafter mentioned a married man domiciled in the State of California. In 1920 and 1921, the years here involved, he earned for personal services the sums of $24,339.00 and $22,946.20. He and his wife made separate income-tax returns for the years stated, each returning one-half of the above amounts. The Commissioner of Internal Revenue ruled that the entire amount of the petitioner's earnings was taxable to him, and no part to his wife, and as a result determined that there was a deficiency in the tax paid by the petitioner in the sums of $2,420.12

for 1920, and $2,432.46 for 1921. From this decision the petitioner appealed to the Board of Tax Appeals, where the ruling of the commissioner was sustained.

41 There is no dispute as to the facts. On the first day of June, 1901, the petitioner and his wife entered into a contract in writing as follows: "It is agreed and understood between us that any property either of us now has or may hereafter acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.), or any rights by contract or otherwise, during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise, or inheritance, and all the proceeds, issues, and profits of any and all such property shall be treated and considered, and hereby is declared to be received, held, taken, and owned by us as joint tenants, and not otherwise, with the right of survivorship."

This agreement has been continuously lived up to by the petitioner and his wife throughout the years, and at the time it was made a bank account was opened in their joint names and subject to the check of either, and in this account all incomes, including earnings of the petitioner, have been deposited immediately upon their receipt. It was by reason of these facts that separate income-tax returns were made by the petitioner and his wife.

The question for decision is whether the contract referred to is a valid and binding obligation, and such as a husband and wife may legally make, and if so whether under its provisions the personal earnings of the petitioner immediately became the joint property of himself and wife as soon as earned. Or was there an interval before the title passed to their joint estate during which time such earnings were impressed with the community-property status, and returnable by and taxable to him under U. S. vs. Robbins (269 U. S. 315)?

42 Sections 162, 163, and 164 of the Civil Code of California provide that all property owned by either spouse before marriage or thereafter acquired by gift, bequest, devise, or descent, with the rentals, issues, and profits thereof, is separate property, and all other property acquired after marriage by either spouse belongs to them as community property; but by the same law a husband and wife may enter into any engagement or transaction with the other respecting property which either might if unmarried (sec. 158), and they may hold property as joint tenants, tenants in common, or as community property (sec. 161). It is consequently the holdings of the Supreme Court of California that an agreement between a husband and wife domiciled there, without any other consideration than their mutual consent that the future earnings of the wife should be her separate property is valid, and such earnings do not become community property. (Wren vs. Wren, 100 Cal. 276; Cullen vs. Bisbee, 168 Cal. 695; Kaltschmidt vs. Weber, 145 Cal. 596.) If, as thus seems to be the settled law of the State, and which is recognized as such by the Board of Tax Appeals (In re Krull, 10 B. T. A. 1096), a husband and wife may legally agree by contract

that the future earnings of the wife shall be her separate property, and by virtue of such agreement they do not become the property of the community, there is no sufficient reason why they may not make a similar agreement with reference to the earnings of the husband or, as here, that their joint earnings shall belong to them jointly and not otherwise.

Under the California system there is no difference between the earnings of the wife and the earnings of the husband. They are each community property (Martin vs. Southern Pacific, 130 Cal. 285), and an agreement of husband and wife that her future earnings may nevertheless be her separate property differs in no way in principle from an agreement that his earnings may be the joint property of both. (Estate of Harris, 169 Cal. 725.)

43

We conclude therefore that the contract is valid and such as a husband and wife may legally make.

The remaining question is its proper construction. The petitioner claims that by its terms his personal earnings became the joint property of himself and wife immediately upon being earned, while the position of the Government is that, notwithstanding the language of the contract, there was an interval of time during which his earnings belonged to the community and were taxable as such. We are unable to agree with this latter view. The language of the contract is that the earnings, including salaries, fees, etc., of either spouse shall be treated and considered and "is hereby declared to be received, held, taken, and owned" by them as joint tenants and not otherwise.

This clearly indicates an intention that the earnings of either spouse shall not be received and held by the community but by them as joint tenants. The Board of Tax Appeals and the Government seem to rely principally on the decision of this court in Blair vs. Roth (22 Fed. 2d, 932). In that case the contract as construed by the court amounted to nothing more than an agreement between a husband and wife that they would contribute their earnings to a common fund out of which their personal and community expenses would be paid and the savings, if any, would be owned by them jointly. There was no agreement, as here, that the earnings of either spouse should be received and held and owned as the joint property of both, but merely that each would contribute his or her earnings to a common fund. It is evident that the parties here did not have in mind that the future earnings of either should first be received by him or her and then turned over to a joint tenancy; but the intention clearly expressed is that the earnings should be received, taken, and held from the very beginning as the joint property of both.

44

Decree of Board of Tax Appeals reversed.

[File endorsement omitted.]

45 In United States Circuit Court of Appeals

No. 5602

GUY C. EARL, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Judgment

Filed Feb. 25, 1929

Upon petition to review an order of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was duly submitted.

On consideration whereof it is now here ordered and adjudged by this court that the order of the said Board of Tax Appeals in this cause be, and hereby is, reversed.

[File endorsement omitted.]

46 In United States Circuit Court of Appeals

Application for stay of mandate

[Postal Telegraph—Commercial cables—Telegram]

F50 SFFG 1201P 35 2 Extra. Govt. Blue. April 22, 1929.

V WASHINGTON, D. C., *Apr. 20, 1929.*

UNITED STATES ATTORNEY,

San Francisco.

Pending decision Solicitor General on recommendation for certiorari, please get a further stay of mandate in Guy C. Earl v. Commissioner, number five six naught two, decided by your Circuit Court of Appeals.

MITCHELL, *Attorney General.*

47 In United States Circuit Court of Appeals

[Title omitted.]

Order staying issuance of mandate

Filed April 22, 1929

Upon telegraphic application of Hon. W. D. Mitchell, Attorney General, counsel for the respondent, and good cause therefor appearing, it is ordered that the issuance, under rule 32, of the mandate of this court in the above cause be, and hereby is, stayed to and includ-

ing May 20, 1929; and in the event the petition for a writ of certiorari to be made by the respondent herein be docketed in the clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANK H. RUDKIN,
United States Circuit Judge.

Dated San Francisco, California, April 22, 1929.

[File endorsement omitted.]

48 [Clerk's certificate to foregoing transcript omitted in printing.]

49 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 34224. United States Circuit Court of Appeals, Ninth Circuit. Term No. 99. Robert H. Lucas, as Commissioner of Internal Revenue, petitioner, vs. Guy C. Earl. Petitioner for writ of certiorari and exhibit thereto. Filed May 20th, 1929. File No. 34224.

U. S. GOVERNMENT PRINTING OFFICE: 1929

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CHARLES ELMORE

FILE COPY

No. 99

In the Supreme Court of the United States.

OCTOBER TERM, 1928

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GUY C. EARL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

U.S. GOVERNMENT PRINTING OFFICE: 1929

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GUY C. EARL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Attorney General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above cause on February 25, 1929, reversing a decision of the United States Board of Tax Appeals.

STATEMENT

This case reached the Circuit Court of Appeals on the petition of the respondent, Guy C. Earl, for a review of the decision of the Board of Tax Ap-

peals, determining an additional tax upon respondent's income for the years 1920 and 1921. The sole question in the case is whether a written agreement, between respondent and his wife, providing that the property which either of them owned, and which either of them might thereafter receive or acquire, was to be received, held, and owned by them as joint tenants, had the effect of making one-half of the salary and fees, earned and received by the respondent, taxable to his wife, or whether the salary and fees were community income, taxable, as such, all to the respondent.

The findings of fact made by the Board of Tax Appeals (R. 14–15) disclose that the respondent is, and was during the years 1920 and 1921, an attorney, resident in California. In 1888, respondent married. Having accumulated considerable property, consisting of cash, bonds, lands, and other property, and his wife, Ella F. Earl, having, at that time, about $30,000 worth of property, respondent, on June 1, 1901, entered into a contract in writing with his wife, as follows:

> It is agreed and understood between us that any property either of us now has or may hereafter receive or acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise or inheritance, and all the proceeds, issues and

profits of any and all such property shall be treated and considered and hereby is declared to be received, held, taken and owned by us as joint tenants and not otherwise with the right of survivorship.

(Signed) GUY C. EARL.
ELLA F. EARL.

The above agreement has been in effect since the date thereof, and all amounts received by the respondent, as income, from personal services, consisting of salaries, fees, etc., as well as the income from property, have been deposited in a joint bank account, which was opened at approximately the same time as the signing of the above agreement.

Respondent's salary, as an officer of the Great Western Power Company, and fees received, as an attorney, were deposited to their joint account immediately upon receipt thereof. Mrs. Earl, at all times, has had the right to draw against this account at will.

In the year 1920, respondent received as salary, fees, etc., the sum of $24,839, and in the year 1921, he received from the same sources $22,946.20. Respondent included only one-half of the above amounts as taxable income in the returns filed by him for those years. The Commissioner of Internal Revenue, in reviewing the respondent's returns, determined that the entire amount of said salary and fees earned by Earl was taxable to him and should have been included by him in gross income for the years 1920 and 1921. As a result, he pro-

posed an additional assessment upon respondent in the sum of $2,420.12 for the year 1920, and $2,432.46 for the year 1921. (R. 10.) The taxpayer, on October 7, 1925, prior to the enactment of the Revenue Act of 1926, took an appeal to the Board of Tax Appeals, which rendered its decision February 16, 1928, upholding the determination of the Commissioner. From this decision of the Board of Tax Appeals the respondent, on August 2, 1928, took an appeal to the Circuit Court of Appeals for the Ninth Circuit, which, on February 25, 1929, reversed the decision of the Board of Tax Appeals, holding that the contract was valid and such as a husband and wife may legally make; that under its provisions the personal earnings of respondent immediately became the joint property of himself and his wife as soon as earned, and that, as such, the said earnings were taxable one-half to each. (R. 38–40.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

I. In reversing the decision of the Board of Tax Appeals.

II. In holding that under the agreement between the respondent and his wife the personal earnings of the respondent became the joint property of him and his wife as soon as earned and became taxable one-half to each.

III. In not holding that the personal earnings of the respondent were taxable in their entirety to him.

REASONS FOR GRANTING THE WRIT

This case is of general importance. The principle involved is one which is constantly arising in various forms.

If the principle announced by the Circuit Court of Appeals becomes the settled law, then compensation for personal services may be divided into infinitesimal parts by agreements between any person having income from personal services and his immediate family so as to defeat the manifest intent of Congress to tax such income as a whole. Further, the principle announced seems broad enough to enable a person to escape taxation by mere assignments to third parties which operate to divest him of the right to receive his earnings.

If a husband, contracting with his wife, in the same manner and to the same extent as they could contract if unmarried, may assign to his wife a portion of his salary and fees and either have so much thereof paid directly to her, or receive and hold all of the salary and fees for himself and his wife, as joint tenants, with the result that he is taxable on a part only, his wife being taxable on the aliquot part so assigned to her, the doctrine of constructive receipt, long followed by the Bureau of Internal Revenue, and recognized by the Circuit Courts of Appeals in *Anderson* v. *Morris & E. R. Co.*, 216 Fed. 83; *West End St. Ry. Co.* v. *Malley*, 246 Fed. 625 (certiorari denied, 246 U. S. 671); *Rensselaer & S. R. Co.* v. *Irwin*, 249 Fed. 726 (certiorari denied,

246 U. S. 671); *Northern R. Co. of New Jersey* v. *Lowe,* 250 Fed. 856; *American Telegraph & Cable Co.* v. *United States,* 61 Ct. Cls. 326 (certiorari denied, 271 U. S. 660); *Houston Belt & Terminal Ry. Co.* v. *United States,* 250 Fed. 1; *Mitchell* v. *Bowers,* 9 F. (2d) 414, 15 F. (2d) 287 (certiorari denied, 273 U. S. 759); *United States* v. *Western Union Telegraph Co.,* 19 F. (2d) 157; and *Bing* v. *Bowers,* 22 F. (2d) 450, must be modified accordingly.

The decision below is in conflict with the rule generally recognized by the courts and relied upon by the Bureau of Internal Revenue, that an assign ment of future salary, fees, and wages, not yet contracted for, does not operate to pass anything *in praesenti,* but gives the assignee only a right enforceable in equity. The agreement providing for the creation of a joint tenancy in personal property not in existence and not yet contracted for can not give the wife any greater rights thereunder than if she were a mere assignee. *Cox* v. *Hughes,* 10 Cal. App. 553.

The decision, if acquiesced in, will result in confusion in the administration of the Revenue Acts.

WILLIAM D. MITCHELL,
Attorney General.

MAY, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals (R. 38–40) is reported in 30 F. (2d) 898.

The opinion of the United States Board of Tax Appeals (R. 15–17) is reported in 10 B. T. A. 723.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered February 25, 1929. (R. 40.) The jurisdiction of this Court rests on the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The appeal to the Board of Tax Appeals was taken prior to the passage of the Revenue Act of 1926, and the decision of the Board was rendered subsequent to the passage of that Act, so that there is present in this case the question whether the statutes authorizing appeals from the Board of Tax Appeals to the United States Circuit Courts of Appeals are constitutional. This question is involved in *Old Colony Trust Company* v. *Commissioner of Internal Revenue,* No. 130, now being considered by this Court, but not yet decided.

QUESTION PRESENTED

A written agreement, entered into in 1901, between respondent and his wife, provided that the property which either of them owned, and which either of them might thereafter receive or acquire, was to be received, held, and owned by them as joint tenants. The sole question is, did this agreement have the effect of making one-half of the salary and fees earned and received by the respondent, in 1920 and 1921, taxable to his wife, or did the salary and

fees constitute income taxable as an entirety to the respondent?

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057:

PART II.—INDIVIDUALS

NORMAL TAX

SEC. 210. That, * * * there shall be levied, collected, and paid for each taxable year upon the *net income* of every individual a normal tax. * * * (Italics supplied.)

SEC. 212. (a) That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.

SEC. 213. That for the purposes of this title * * * the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions * * *.

SURTAX

SEC. 211. (a) That, * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax * * *.

Sections 210, 211 (a), 212 (a), and 213 of the Revenue Act of 1921, c. 136, 42 Stat. 227, are similar to the provisions of the 1918 Act above quoted.

STATEMENT

A statement of the facts and of the errors relied on will be found in the petition.

ARGUMENT

The question presented is one deserving the consideration of this Court on certiorari. Sections 210 and 211 (a) of the Revenue Acts of 1918 and 1921 impose a normal tax and a surtax upon the net income of every individual. Congress has also declared by Section 213 (a) of these Acts that the income derived as compensation for personal services shall be reported by the recipient and subjected to a Federal tax graduated in proportion to its extent. A personal exemption is granted each taxpayer, and the later statutes further provide for a credit in favor of earned income.

We think it is obvious that Congress intended that each individual should bear the tax burden in proportion to his ability to pay, to be measured by the amount of income realized from his personal efforts added to his other income. The principal question presented by this petition is whether the express purpose of Congress may be evaded by an agreement made by a taxpayer sharing his compensation for personal services with another, with the result that instead of paying a tax which reflects his comparative ability to pay, his compensation is so divided that he pays the tax which would have been due if his compensation had been one-half of what it actually was.

The decision of the court below is not restricted in its application to community property states. Neither is it restricted to husband and wife. It is a decision of general application. If by agreement between husband and wife, contracting as strangers, in a community property state, a wife can acquire an ownership in the husband's earnings, before they attain the community status, a similar agreement in states not having the community property law, but where a husband and wife may enter into valid contracts, would, under the decision below, enable a wife to acquire an ownership in a husband's earnings, from salary and fees, before they become his income. If this agreement operates *eo instanti* to vest title in the wife to one-half of the husband's earnings, as soon as earned, as held by the Circuit Court of Appeals, and prevents them from becoming the sole income of the earner, and prevents the Government tax from attaching, then it would seem that any valid assignment of the right to receive salary which has been earned would operate to make the salary of the earner the income of his assignee. It would thus be possible for any person to split up his salary by making various assignments so that all surtaxes could be avoided, and possibly all taxation. At least, the income would undoubtedly be thrown into the lower normal and surtax brackets, so that the provisions of the taxing acts would be to such an extent nullified. Likewise compensation for personal services might be divided by agreements between any person having income from

personal services and his immediate family so as to defeat the manifest intent of Congress to tax such income as a whole. The dependents for whose support Congress has allowed the taxpayer credits, might easily be invested with income derived from his personal services by the simple expedient of creating a joint tenancy to receive the income.

We think the decisions of this Court furnish precedents which indicate that the expressed will of Congress may not thus be circumvented. The recent decision in *Taft* v. *Bowers,* No. 16, October Term, 1928, decided February 18, 1929, shows that Congress may effectively deal with attempts to defeat the purpose to take part of all gain derived from capital investments. In that case the Court considered a Federal statute taxing property acquired by gift and held the donee upon sale of the property accountable for the entire gain measured by the cost to the donor. It was there recognized that by a mere gift of property to another and a subsequent sale thereof, the sovereign could not be deprived of the right to take by taxation a part of the entire gain, as defined by the Revenue Acts, derived from such sale.

In *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503, the question was whether payments made under Minnesota mining leases constituted taxable income. The Minnesota rule of property recognized mining leases as actual leases and not the equivalent of deeds and it was urged upon this Court that the

local rule was decisive. This Court held that ordinarily and between private parties there is no question of the duty of the Federal court to follow a State rule of property and the impression left by the opinion is that when a Federal statute is involved, the Federal courts are free to determine such questions independently of the local rule. Such was the conclusion of the United States District Court for the Eastern District of Pennsylvania in *Rosenberger* v. *McCaughn,* 20 F. (2d) 139, affirmed 25 F. (2d) 699, certiorari denied October 8, 1928. See also *Weiss* v. *Wiener,* and *Routzahn* v. *Wiener,* Nos. 482, 483, October Term, 1928, decided April 22, 1929.

In *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110, an organization, recognized locally as a partnership, was treated as a corporation when applying a Federal revenue statute.

In *United States* v. *Robbins,* 269 U. S. 315, this Court said that even if a wife has an interest in community income, it does not follow that Congress can not tax the husband for the whole.

Of course, Congress may not ignore the fact that a piece of property is owned by more than one individual and tax the entire gain upon its sale to one of the owners alone. But we think that Congress may properly regard compensation for personal services as the sole income of the individual who performed the services and leave him to divide it after its receipt in any manner he thinks best.

Congress may not prevent its being *held* in joint tenancy, but, on the other hand, Congress may require that in applying a Federal revenue statute, it shall be treated as an entirety and taxed as the income of the individual who earned it.

So in this case, we urge that the purpose of Congress to tax as an entirety the compensation of an individual from personal services rendered by him, may not be thwarted by any agreement which attempts to convert the fruits of the efforts of a single individual into compensation for two individuals.

The decision of the Circuit Court of Appeals also disregards the established doctrine of constructive receipt heretofore applied and recognized in the administration of the Federal taxing statutes. The Bureau of Internal Revenue has long followed the practice of imposing an income tax on the earner of salary and wages, regardless of any agreement with a third party, whereby a part thereof should be paid directly to said third party.

Even if it be conceded that an assignee's interest vests *eo instanti* in salaries, when the same are earned, and that such assignee is entitled to receive the same direct, this fact is not determinative of the question here. The fact that a taxpayer did not, and was not entitled to, receive the salary which he earned, because of an agreement with a third person, would not make the salary any the less income to him and taxable to him. Such a situation is no different in principle from that arising when salary

is taken on an attachment proceeding. Nor does it differ in principle from an assignment of salary to take care of payments due on the purchase price of property, such as an automobile. In each of these cases, although part or all of the salary has not been actually received by the person earning it, it is none the less income taxable to him, in the contemplation of the law.

The Circuit Courts of Appeals have held, so that until this decision it appeared to be definitely settled, that income produced by investment or earned, although by agreement paid over to others, is nevertheless to be regarded as income of the earner or the owner of the property, for taxing purposes, upon the theory that the income has been constructively received. *Rensselaer & S. R. Co.* v. *Irwin,* 249 Fed. 726 (certiorari denied, 246 U. S. 671); *Anderson* v. *Morris & E. R. Co.,* 216 Fed. 83; *West End St. Ry. Co.* v. *Malley,* 246 Fed. 625 (certiorari denied, 246 U. S. 671); *Northern R. Co. of New Jersey* v. *Lowe,* 250 Fed. 856; *American Telegraph & Cable Co.* v. *United States,* 61 Ct. Cls. 326 (certiorari denied, 271 U. S. 660); *United States* v. *Western Union Telegraph Co.,* 19 F. (2d) 157; *Houston Belt & Terminal Ry. Co.* v. *United States,* 250 Fed. 1.

The same result was reached in the case of *Mitchell* v. *Bowers,* 9 F. (2d) 414, 15 F. (2d) 287 (certiorari denied, 273 U. S. 759). See also *Bing* v. *Bowers,* 22 F. (2d) 450.

The instant case is readily distinguishable from the cases in which it has been held that husband and wife may make a valid agreement, whereby the community relinquishes the right to income, in favor of that member of the community earning income. The most that can be said of these cases is that they recognize the right of a husband and wife to nullify the effect of the community property law with reference to their respective earnings which, except for that law, would have been their separate income and property. The effect given the present agreement by the decision of the Circuit Court of Appeals operates not only to nullify the provisions of the community property law but also the expressed intent of Congress to tax compensation from personal earnings as an entirety, and creates the anomalous situation of converting for tax purposes the personal earnings and income of respondent into the separate income of his wife.

Further, in the instant case respondent and his wife, contracting in a State which gives them no greater freedom of contract than if they were unmarried, seek to assign one to the other one-half of their future income, which income, in so far as the earnings of respondent here involved, was to be derived from a contract of employment not in existence at the time of the agreement. The case then becomes governed by the decisions respecting assignments of salary and fees to be earned in the

future, which at the time of the assignment were not contracted for.

The courts have held without exception that the assignment of future wages, not based on an existing contract, does not operate to pass a legal title thereto *in praesenti*. This is in accord with the laws of California which provide that a mere possibility not coupled with an interest can not be transferred. In that state, mere possibilities or expectancies not coupled with an interest are assignable only in equity, and equity will enforce the assignment only when the possibility or expectancy has changed into a vested interest or possession. *Cox* v. *Hughes,* 10 Cal. App. 553; *Walker* v. *Rich,* 79 Cal. App. 139. To the same effect are: *Matter of Black,* 138 App. Div. (N. Y.) 562; *Field* v. *Mayor,* etc., 6 N. Y. 179; *Cooper* v. *Douglass,* 44 Barbour (N. Y.) 409; *Herbert* v. *Bronson,* 125 Mass. 475; *Eagan* v. *Luby,* 133 Mass. 543; *Citizens Loan Assoc.* v. *Boston & Maine R. R.,* 196 Mass., 528. See also 2 Am. Eng. Ency. of Law, p. 1032; Story's Equity Jurisprudence (13th Ed.), Sec. 1040. It is, therefore, believed that under the present agreement the interest which the wife acquired in respondent's earnings was subordinate to the Government's claim for taxes.

CONCLUSION

While we believe that the court below has erred in construing the particular agreement involved in this case, it is urged that the Court should now

determine whether the express purpose of Congress to tax compensation for personal services as an entirety may be nullified by the mere act of the parties.

Respectfully submitted.

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MAY, 1929.

○

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FEB 8

CHARLES ELMORE

No. 99

In the Supreme Court of the United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, AS COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GUY C. EARL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 99

ROBERT H. LUCAS, AS COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

GUY C. EARL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 8–9) is reported in 10 B. T. A. 723. The opinion of the United States Circuit Court of Appeals (R. 18–20) is reported in 30 F. (2d) 898.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 25, 1929. (R. 21.) Petition for writ of certiorari was filed May 20, 1929, and granted October 14, 1929. (R. 22.)

The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A written agreement, entered into in 1901, between respondent and his wife, provided that the property which either of them owned, and which either of them might thereafter receive or acquire, was to be received, held, and owned by them as joint tenants. The sole question is whether this agreement cut in half the compensation for personal service taxable to the respondent in 1920 and 1921, or whether his salary and fees remained taxable to him as an entirety.

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1062, 1064, 1065:

> SEC. 210. That * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax * * *.
>
> SEC. 212. (a) That in the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by section 214.
>
> SEC. 213. That for the purposes of this title * * * the term "gross income"—
>
> (a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of what-

ever kind and in whatever form paid, or from professions * * *.

SEC. 211. (a) That * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax * * *.

Sections 210, 211 (a), 212 (a), and 213 of the Revenue Act of 1921, c. 136, 42 Stat. 227, are similar to the provisions of the 1918 Act above quoted.

STATEMENT

The Board of Tax Appeals made the following findings of fact (R. 7–8):

The respondent is a resident of California. On June 1, 1901, he entered into a contract in writing with his wife, Ella F. Earl, as follows:

> It is agreed and understood between us that any property either of us now has or may hereafter receive or acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise or inheritance, and all the proceeds, issues and profits of any and all such property shall be treated and considered and hereby is declared to be received, held, taken and owned by us as joint tenants and not otherwise with the right of survivorship.
>
> (Signed) GUY C. EARL.
> ELLA F. EARL.

The above agreement has been in effect since its date and all amounts received by the respondent as income from personal services, consisting of salaries, fees, etc., as well as the income from property, have been deposited in a joint bank account.

The respondent and the said Ella F. Earl were married in 1888. In 1901 the respondent had accumulated considerable property, consisting of cash, bonds, lands, and other property. The respondent's wife had about $30,000 worth of property when they entered into the agreement above set out. At the time the respondent was not very well and suggested to his wife that it might be wise for them to enter into such an agreement, which would simplify affairs in case he died during her lifetime, and that "it would take care of her and leave the matter for her administration."

At approximately the same time the contract was entered into the joint bank accounts were made.

The respondent's salary as an officer of the Great Western Power Company and fees received as an attorney were deposited in these joint accounts immediately upon receipt thereof. Mrs. Earl has at all times had the right to draw against the accounts at will.

In the year 1920 the respondent received as salary, fees, etc., the sum of $24,839, and in the year 1921 he received from the same sources $22,946.20.

The respondent included only one-half of the above amounts in his income-tax returns for the

years involved. The Commissioner determined that the entire amount of such income was taxable to the respondent and that no part thereof was taxable to the wife.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

I. In reversing the decision of the Board of Tax Appeals.

II. In holding that under the agreement between the respondent and his wife the personal earnings of the respondent became the joint property of him and his wife as soon as earned and became taxable one-half to each.

III. In not holding that the personal earnings of the respondent were taxable in their entirety to him.

SUMMARY OF ARGUMENT

Congress has sought to tax each individual upon the gain derived from his labor. To that end it is prescribed that the gross income shall include "income derived from salaries, wages, or compensation for personal service." The gain derived from labor can be *salary* only to the person who has performed the services and the statute imposes a tax upon it as an entirety. The purpose of Congress can not be defeated by an agreement—such as respondent made with his wife—that his earnings, including salaries and fees, shall be received by him and his wife as joint tenants. The courts have held that similar divisions of income from prop-

erty are ineffective for income tax purposes. The same rule should be followed with respect to income from labor.

ARGUMENT

Sections 210 and 211 of the Revenue Acts of 1918 and 1921 impose a normal tax and surtax upon the net income of every individual. Section 212 of the statute defines net income as the gross income as defined in Section 213, less the deductions allowed by Section 214. Section 213 defines gross income and includes therein "gains, profits, and income derived from salaries, wages, or compensation for personal service." A personal exemption is granted each taxpayer by Section 216, and the later statutes further provide for a credit in favor of earned income.

We submit that salaries, wages, and compensation for personal services are to be taxed as an entirety and therefore must be returned by the individual who has performed the services which produced the gain. Salaries, wages, and compensation for personal services are familiar terms, descriptive of the gain derived from labor. That gain can be *salary* only to the person who has performed the services. (Cf. *Old Colony Tr. Co.* v. *Comm'r. Int. Rev.*, 279 U. S. 716, 729–730, and cases there cited.) If it is paid directly to some one else, it is nevertheless chargeable to the person who has performed the services. In such a case the money received by the third person is not compensation for personal services as to him, and whether it is in-

come to him at all depends upon the consideration which he gave for it. So long as money is compensation for personal services it is income to the employee, and Congress sought to tax it as income to the employee before it assumed a different character to some one else.

Even if it be conceded that the assignee's interest vests in the salary *eo instanti,* when it is earned, and that such assignee is entitled to receive the same direct, that is not determinative of the question here. The fact that a taxpayer did not, and was not entitled to, receive the salary which he earned, because of an agreement with a third person, would not make the salary any the less taxable income to him. Such a situation is not different in principle from that arising when salary is taken on an attachment proceeding. Nor does it differ in principle from an assignment of salary to take care of instalment payments due on the purchase price of property. In each of these cases, although part or all of the salary has not been actually received by the person earning it, it is none the less income taxable to him, in the contemplation of the law.

As between themselves the agreement may have given Mrs. Earl a half-interest in her husband's earnings. But they were his earnings and came within the statutory definition of income derived from personal services. The fact that the wife has an interest in the salary does not relieve the husband from liability to pay an income tax on the whole salary. Cf. *United States* v. *Robbins,* 269 U. S. 315, 327.

The decision of the court below is not restricted in its application to community property states. Neither is it restricted to husband and wife. It is a decision of general application. If it is sound, it would seem that any valid assignment of the right to receive salary which has been earned would have the same result. It would also be possible for any person having income from personal services, by agreement with his immediate family, to split up his salary to such an extent that surtaxes, and possibly all taxation, could be avoided.

The recent decision in *Taft* v. *Bowers*, 278 U. S. 470, shows that Congress may effectively deal with attempts to defeat its purpose to take part of all gain derived from capital investments. In that case the Court upheld a Federal statute making the donee accountable upon sale of property received by gift for the entire gain measured by the cost to the donor. It was there recognized that by a mere gift of property to another and a subsequent sale thereof the Government could not be deprived of the right to take by taxation a part of the entire gain, as defined by the Revenue Acts, derived from such sale.

So in this case, we submit that the purpose of Congress to tax as an entirety the compensation of an individual from personal services rendered by him may not be thwarted by any agreement which attempts to convert the gain derived from the ef-

forts of a single individual into compensation for two individuals.

The courts have held that somewhat similar divisions of income are ineffective for tax purposes.

In *Mitchel* v. *Bowers* (C. C. A. 2d), 15 F. (2d) 287 (certiorari denied, 273 U. S. 759), the taxpayer, a member of a partnership, had agreed with his wife that she should be entitled to one-half of the profits which should come to him from the firm and should be liable to pay one-half of the losses which he might sustain by reason of his partnership. Settlements were to be made annually, and the contract might be terminated at the option of either party at any time. The contract was filed with the firm, which was directed to credit and pay over to the wife as they accrued the profits to which she became entitled under the terms of the contract. Thereupon the firm credited to the account of the wife as they accrued one-half of the husband's profits, making them subject to her absolute disposition. Because of this agreement the husband contended that he should be assessed for only one-half of his share of the partnership profits. This contention was denied, not only because of the provision for termination of the contract, but also upon the larger consideration that the entire income of a partnership must be accounted for by the partners. The court said (p. 289):

> Moreover, taken more at large, the sections were in our judgment meant to read compre-

hensively. Their purpose was to reach all the firm income by taxing the partners individually. It would be a denial of that purpose to suppose that all the firm profits might not be taxable against the partners, but might have to be reached under other sections of the statute. Certainly it can not be argued that the wife could be taxed under these sections. Therefore, if the plaintiff be right, they allowed some part of the firm income to escape, and left it to be caught elsewhere. This we think they pretty clearly forbid. Any mediate arrangement by which a partner shared what he might get after he got it did not, therefore, put him outside the scope of such provisions, even if he reserved no power to terminate the contract.

In *Willard C. Hill* v. *Commissioner* and *William H. Plumer* v. *Commissioner* (C. C. A. 1st), decided January 23, 1930, not yet reported, members of a partnership attempted to divide partnership profits with the estate of a deceased member which did not succeed to the decedent's interest in the partnership, and contended that the payments to the estate were not a part of the partners' income. It was held that the partners must account for all of the partnership profits, and that since the estate was not a member of the partnership the sums paid to it must be treated as the income of the partners.

See also *Walter S. Benedict* v. *Warren G. Price* (E. D. N. Y.), decided November 26, 1929, not yet reported; *Bing* v. *Bowers,* 22 F. (2d) 450.

In *Maud Dunlap Shellabarger* v. *Commissioner*, 14 B. T. A. 695, 699, it was said:

> The Board cases hold that where the taxpayer retains his interest in the property or fund from which the income was derived, the income is taxable to him and not to the person who eventually receives the money. (Citing cases.)

We submit that none of the cases cited by respondent in his brief in opposition to our petition is contrary to our contentions.

In *Bowers* v. *New York Trust Co.* (C. C. A. 2d), 9 F. (2d) 548, the partners of a selling agency for a group of mills agreed that in consideration that one of the partners, Cannon, give up his right under an earlier partnership contract to 60% of the gross receipts the partnership would act as selling agent for three of the mills without compensation. The mills agreed to pay for this service stipulated commissions to Cannon and certain other members of his family. The court held that the commissions paid by such mills to the family of Cannon were not taxable as income of the partnership. The reasoning of the opinion was that the former payments never had been partnership income, but consideration which Cannon meant to require the partnership to pay him for doing business with it at all. Had the facts of that case created a situation comparable to that existing in the instant case, it is clear that the principle for which we contend

would have been sustained, for the court said (p. 550):

> To take the present case, one might suppose that the partners were to divide between them all the firm contracts with the several mills, and each was to make a contract with the firm not to collect any of the commissions due upon any of them. Acting upon such contracts, each might persuade the mills to pay him the commissions upon the contracts assigned to him, leaving the firm as the worker, while the partners, the drones, sucked the honey. It may well be that such an arrangement would be regarded as merely a device for sharing the profits, and that the commissions would remain firm income under the tax laws. For the purposes of argument we will assume that this is so.

In *O'Malley-Keyes* v. *Eaton,* 24 F. (2d) 436, and *Young* v. *Gnichtel,* 28 F. (2d) 789, cited by respondent, District Courts held that the income paid by virtue of an assignment was not taxable to the assignor. But each involved an assignment by a beneficiary of a vested interest in a trust fund.

The respondent also relies on the cases of *Wren* v. *Wren,* 100 Cal. 276; *Cullen* v. *Bisbee,* 168 Cal. 695; and *Kaltschmidt* v. *Weber,* 145 Cal. 596, in which it was held that husband and wife may make a valid agreement whereby they relinquish the right to income as community property in favor of the member of the family earning the income. The most that can be said of these cases is

that they recognize the right of a husband and wife to modify the effect of the community property law with reference to their respective earnings which, except for that law, would have been their separate income and property. The effect given the present agreement by the decision of the Circuit Court of Appeals operates not merely to modify the provisions of the community property law but also to nullify the intent of Congress to tax compensation from personal earnings as an entirety, and creates the anomalous situation of converting for tax purposes the personal earnings and income of the husband into the separate income of his wife.

CONCLUSION

In view of the foregoing it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

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FEBRUARY, 1930.

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No. [redacted] 99

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

GUY C. EARL,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

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No. 915

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

GUY C. EARL,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

STATEMENT OF CASE.

This brief is in opposition to a petition for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit. That court reversed a decision of the Board of Tax Appeals in a proceeding for review taken under the provisions of the Revenue Act of 1926, as amended. This Court has upheld the constitutionality of such review provisions in *Old Colony Trust Company v. Commissioner of Internal Revenue*, decided on June 3, 1929 (October term, 1928, No. 130).

The facts of this case are not disputed. They are:

In 1901 the respondent and his wife, residents of California, entered into an agreement in writing as follows:

"Oakland, June 1, 1901.

It is agreed and understood between us that any property either of us now has or may hereafter acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise or inheritance, and all the proceeds, issues and profits of any and all such property shall be treated and considered and hereby is declared to be received, held, taken and owned by us as joint tenants and not otherwise with the right of survivorship.

Guy C. Earl.
Ella F. Earl."

This agreement was supported by ample and adequate consideration, not only in the fact that section 160 of the California Civil Code (see Appendix A of this brief) provides that the mutual consent of the parties to such an agreement is sufficient consideration, but also in the fact that at the time the agreement was made respondent had considerable property and his wife had property worth about $30,000. The agreement has been consistently lived up to by the respondent and his wife throughout the years. At the time of its making, a bank account in their joint names, and subject to check by either of them, was opened, and in this account all income, including the earnings of the respondent, has been deposited immediately upon receipt.

This being the situation, the respondent and his wife made out separate income tax returns and each returned as his or her income one-half of their joint income. In 1920 and 1921, the years here involved, the respondent earned for personal services the sums of $24,839.00 and $22,946.20, respectively. The Commissioner of Internal Revenue, petitioner herein, ruled that notwithstanding the agreement providing that all earnings should be joint property, the earnings of respondent were his and taxable to him, and no part thereof was taxable to his wife. As a result the Commissioner determined that there were deficiencies in the taxes paid by respondent in the sum of $2420.12 for 1920 and in the sum of $2432.46 for 1921. From this determination the respondent appealed to the Board of Tax Appeals, where the ruling of the Commissioner was sustained. Respondent then petitioned the Circuit Court of Appeals for the Ninth Circuit to review the decision of the Board of Tax Appeals, and upon such review the Circuit Court of Appeals reversed the decision of the Board.

The Board of Tax Appeals, in its opinion, (Tr. p. 15, 10 B. T. A. 723) conceded that the agreement was valid and binding between the parties, but held, and here is the gist of the whole controversy, that while the agreement was effective to make the earnings of the husband the joint property of the husband and wife, it operated to make them such joint property only after they had been received by the husband, so that there was an instant of time in which the husband held all his earnings as the beneficial owner thereof,—as a result of which they were taxable to him alone.

The Circuit Court of Appeals reversed this ruling as inconsistent with the California law applicable to agreements between husbands and wives and with the terms of the agreement, and held, on the contrary, that the agreement operated on future earnings *as they were earned*, and vested the right to such earnings before their receipt jointly in husband and wife, so that there was never a moment when they were the sole property of the husband. (See its opinion, Tr. p. 38, 30 F. (2d) 898.)

I.

THERE IS NO REASON FOR THIS COURT TO REVIEW THE DECISION OF THE CIRCUIT COURT OF APPEALS AS TO THE LAW OF CALIFORNIA GOVERNING AGREEMENTS BETWEEN HUSBANDS AND WIVES OR AS TO THE PROPER CONSTRUCTION OF THE CONTRACT BETWEEN RESPONDENT AND HIS WIFE UNDER THE CALIFORNIA LAW; THE CIRCUIT COURT OF APPEALS WAS FULLY QUALIFIED TO, AND DID, DETERMINE THESE QUESTIONS CORRECTLY.

Petitioner does not in his petition to this court contend, and could not successfully contend, that the Circuit Court of Appeals in this case erred in its interpretation of the California law applicable to agreements between husbands and wives or in its construction of the contract in question in the light of such California law. On these matters the Circuit Court of Appeals was fully qualified to pass final judgment. Furthermore, its holdings on these questions were manifestly correct and petitioner does not deny that this is so. The Circuit Court of Appeals decided, according to its opinion:

(1) That although property acquired after marriage by a husband and wife domiciled in California, (other than property acquired by gift, bequest, devise or descent), is community property in the absence of agreement to the contrary, nevertheless California Civil Code Sections 158 and 161 expressly permit such husband and wife to alter this normal situation by agreement as if they were unmarried, and to receive and hold property as joint tenants, or tenants in common. (See Appendix A for these code sections.)

(2) That an agreement between a husband and wife domiciled in California, without any other consideration than their mutual consent, providing that the future earnings of the wife should be her separate property is valid "and such earnings do not become community property". (Citing *Wren v. Wren,* 100 Cal. 276, 34 Pac. 775; *Cullen v. Bisbee,* 168 Cal. 695, 144 Pac. 968; *Kaltschmidt v. Weber,* 145 Cal. 596, 79 Pac. 272, and *Krull v. Commissioner of Internal Revenue,* 10 B. T. A. 1096).

(3) That "under the California system there is no difference between the earnings of the wife and the earnings of the husband," and that accordingly an agreement that the husband's earnings shall be joint property "is valid and such as a husband and wife may legally make". (Citing, *Martin v. Southern Pacific Company,* 130 Cal. 285, 62 Pac. 515, and *Estate of Harris,* 169 Cal. 725, 147 Pac. 967).

(4) That the language of the contract between respondent and his wife clearly indicates an intention "that the earnings should be received, taken and held from the very beginning as the joint property of both", and is thus clearly distinguishable from the contract considered by the same Circuit Court of Appeals in *Blair v. Roth,* 22 F. (2d) 932, which merely provided that the husband and wife in that case "*would* contribute their earnings to a common fund, out of which their personal and community ex-

penses would be paid, and the savings, if any, would be owned by them jointly."

We do not propose in this brief to reargue the above points of California law, and of contract interpretation. Not only does petitioner leave these points unchallenged, but the California authorities cited and relied upon in the opinion of the Circuit Court of Appeals fully support the conclusions above summarized; a reference to these authorities is sufficient to demonstrate that there is no reason for invoking the extraordinary reviewing power of this court to pass on these questions of California law and contract interpretation.

II.

THE REASONS ASSIGNED BY THE PETITIONER FOR GRANTING THE WRIT OF CERTIORARI ARE UNSUBSTANTIAL AND INSUFFICIENT.

What then are the reasons advanced as grounds for the prayer that this court review the case? Our examination and analysis of the petition and brief in support thereof reveals only the four following arguments:

(1) The argument that the judgment in this case countenances an evasion of taxation.

(2) The argument that the Revenue Acts of 1918 and 1921 evince the paramount intention of Congress to tax a husband upon all of his earnings regardless of any agreement with his wife, and regardless of the effectiveness of such agreement under applicable state law.

(3) The argument that the judgment ignores the theory of "constructive receipt".

(4) The argument that an assignment of future earnings does not operate *in praesenti* except to give a right enforceable in equity.

We shall now proceed to discuss each of these arguments briefly in order to demonstrates that they are unsubstantial and insufficient to invoke the reviewing power of this court.

(a) The argument that the judgment in this case countenances an evasion of taxation is an unwarranted attempt to attract attention.

On page 9 of petitioner's brief it is said:

> "The principal question presented by this petition is whether the express purpose of Congress may be *evaded** by an agreement made by a taxpayer sharing his compensation for personal services with another, with the result that instead of paying a tax which reflects his comparative ability to pay, his compensation is so divided that he pays the tax which would have been due if his compensation had been one-half of what it actually was."

A brief examination of the record is sufficient to demonstrate not only the unsoundness but the unfairness of this argument on behalf of petitioner. The contract in question in this case was a written contract made in 1901 at a time when the only practicable kind of federal income tax law, namely, the kind which did not apportion the tax among the states, had been held unconstitutional by this court in the *Pollock* case, (157 U. S. 429, 15 Sup.

*Italics ours.

Ct. 673, 39 L. ed. 759), and also at a time eight years before Congress proposed, and twelve years before the states ratified, the constitutional amendment permitting such a tax. It is absurd to characterize a contract made under such circumstances as an attempt at evasion of the income tax laws of 1918 and 1921.

Petitioner's "evasion" argument, however, has another aspect. It is urged that

> "If the principle announced by the Circuit Court of Appeals becomes the settled law, then compensation for personal services may be divided into infinitesimal parts by agreements between any person having income from personal services and his immediate family so as to defeat the manifest intent of Congress to tax such income as a whole. Further, the principle announced seems broad enough to enable a person to escape taxation by mere assignments to third parties which operate to divest him of the right to receive his earnings." (Petition, page 5.)

In reply to this line of argument it should first be pointed out that this case is *sui generis*. It involves property relations by agreement between a husband and wife under the statutory provisions of one state—California; and thus it does not constitute authority upon agreements between other persons. In the second place this decision involves a binding contract supported by adequate consideration, and also one as to which the California law has made a specific exception to the usual requirement of consideration. The "mere assignments to third parties", which petitioner fears will be legalized for tax purposes, thus do not come within the scope of this decision.

However, if the holding of the Circuit Court of Appeals were authority to the effect that an individual might avoid taxation upon himself by *complete and bona fide* assignments of his future income to others, nevertheless this would be no valid reason for reversing the judgment. If taxpayer A does effectively assign a part of his income to B, prior to its receipt, so that the income belongs to B as soon as it comes into existence, why should A be taxed upon it rather than B? There is no just reason—no reason at all except to give the federal government more revenue. Petitioner seems to fear a large reduction in revenue by such arrangements. He imagines a division of future earnings into infinitesimal parts among a man's immediate family; but there is obviously no likelihood that many taxpayers will voluntarily give up their future income completely to others, even to members of their families. Those who really do so in good faith and without retaining control over such income should have the benefit of their sacrifice and should not be taxed.

(b) The argument that the Revenue Acts in question evince a paramount intention on the part of Congress to tax a husband upon all of his earnings is unsupported by any provision in those acts.

This seems to be the argument chiefly relied upon in the brief in support of the petition for certiorari (pages 9-13). Although it is repeatedly stated that the Revenue Acts of 1918 and 1921 show the paramount intention of Congress to tax the husband upon all his earnings regardless of the fact that these earnings may belong to another, no provisions of the Revenue Acts are specifically

referred to or quoted in support of such statements. The truth is that there is no indication in either the Revenue Act of 1918 or that of 1921 as to which person Congress intended to subject to the tax as between a husband and wife in a case like this, where the husband has earned the income in question but one-half of it belongs to the wife from the moment it comes into existence and prior even to its receipt. On page 8 of petitioner's brief the following extracts from Sections 210, 212, 213 and 211 of the Revenue Act of 1918 are quoted under the heading "Statutes Involved":

> "Sec. 210. That, * * * there shall be levied, collected, and paid for each taxable year upon the *net income* of every individual a normal tax. * * * (Italics supplied.)
>
> Sec. 212. (a) That in the case of an individual the term 'net income' means the gross income as defined in section 213, less the deductions allowed by section 214.
>
> Sec. 213. That for the purpose of this title * * * the term 'gross income'—
>
> (a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions * * *.
>
> SURTAX.
>
> Sec. 211. (a) That, * * * there shall be levied, collected, and paid for each taxable year upon the net income of every individual, a surtax * * *."

It is then stated on the same page of petitioner's brief that similarly numbered provisions of the Revenue Act of 1921 are similar to the provisions of the Revenue Act of 1918 above quoted.

A brief examination of the above quoted provisions of the Act is sufficient to demonstrate that Congress did not indicate any intention as to which person should be taxable upon salaries, wages or compensation for personal service. Congress clearly intended that someone should be taxable on this kind of income because it included such income in its definition of gross income. But the provision is that gross income includes "income *derived* from salaries, wages or compensation for personal service". Derived by whom? The statute is silent on this question. It does not say that the *earner* of the income is to be taxed although the income may belong to another. It merely states that salaries, wages and compensation for personal service shall be a part of *someone's* gross income; and in order to determine who this someone is, we must go back to the question of the person to whom that income belongs.

In the absence of any provisions of the federal statutes on this question, we must of necessity turn to the local law of property—which is here the California law with regard to property relations between husband and wife and with regard to the construction of the contract involved in this case. That is exactly what this court did in the case of *United States v. Robbins,* 269 U. S. 315, 46 Sup. Ct. 148, 70 L. ed. 285. In that case this Court first held that the question whether a wife was taxable for federal income taxes upon one-half of the community income of her husband and herself (both being residents of California and having made no contract such as the one involved in this case), was determined by the California community property law as construed by the Supreme Court of California. The decisions of the Supreme

Court of California were examined and it was concluded that they meant that in the absence of agreement the wife had no vested interest in community property during the lifetime of the husband,—in other words, that community property and community income did not in any way or in any part belong to the wife. Accordingly it was held that for federal income tax purposes none of the community income in that case was income to the wife.*

In this case exactly the same test has been made. The Circuit Court of Appeals has consulted the California law and has concluded that because of the agreement between respondent and his wife respondent's earnings belong one-half to his wife. It follows that such one-half is taxable to her rather than to him.

Petitioner has great difficulty to keep from conceding that the test applied by the Circuit Court of Appeals is correct. In an endeavor to avoid any such concession, petitioner advances the argument that Congress has evinced an intention to tax the *earner* of income rather than the *recipient* or *owner* of such income. Thus it is said on pages 12 and 13 of petitioner's brief:

> "Of course, Congress may not ignore the fact that a piece of property is owned by more than one individual and tax the entire gain upon its sale to one of the owners alone. But we think that Congress may

*It is true that in the *Robbins* case the decision of this Court was also rested on the independent ground that Congress could tax the husband because he controlled and had full disposition of the community income; and this Court evidently concluded that Congress had indicated an intent to tax the person who controlled income, although the statutory provisions indicating such intent were not pointed out. However, this other ground for the *Robbins* case cannot have any application to the present controversy because here the record is clear to the effect that respondent and his wife were in joint and equal control of the income in question, and that respondent did not exclusively control it or have the exclusive disposition of it.

properly regard compensation for personal services as the sole income of the individual who performed the services and leave him to divide it after its receipt in any manner he thinks best. Congress may not prevent its being *held* in joint tenancy, but, on the other hand, Congress may require that in applying a Federal revenue statute, it shall be treated as an entirety and taxed as the income of the individual who earned it."

We doubt very much whether Congress could, as petitioner asserts, tax the earner of income rather than the person who receives the income, or the one to whom it belongs. If a corporation employs a brilliant inventor at a low salary under a contract whereby the corporation obtains all the products of the inventor's genius, can Congress constitutionally tax the inventor himself upon the income of the corporation from his inventions, in an amount largely in excess of his salary, merely because he has undoubtedly been the earner of that income for the corporation? It seems to us that an attempt to tax an earner of income, merely because he is the earner, upon what someone else receives as a result of his efforts, would be mere confiscation.

Nevertheless, it is not necessary to determine this question in this case because there is no indication whatever of any intention on the part of Congress to tax an earner as such. Petitioner quotes no provision of the statutes to this effect for the obvious reason that there is no such provision.

The taxation of a partnership is a clear example of an intention on the part of Congress to the contrary. Take

the case of an ordinary law partnership composed of three individuals who have agreed to share profits equally. Obviously in such a case the actual amounts earned by the respective partners are seldom the same. One year one partner may have a large business and contribute considerably more than his one-third to the earnings of the partnership. Another year it may be another partner. Nevertheless the income tax acts do not provide for the taxation of the partners upon what they respectively earn. They are taxed rather upon their shares of the total partnership income as determined by their partnership agreement. It is not the person who earns the income, but the person to whom the income belongs that is important for income tax purposes.

(c) The argument that the decision of the Circuit Court of Appeals disregards the "constructive receipt theory" is fallacious because under that theory the person who is taxed on account of having constructively received income must have received an equivalent benefit.

Petitioner's petition and brief both cite numerous "constructive receipt" cases. In addition to the authorities so cited there should be mentioned in the same class two recent decisions of this Court in companion cases, namely,

Old Colony Trust Company v. Comm. of Int. Rev., (decided June 3, 1929, Oct. Term 1928, No. 130), and

United States v. Boston & Maine Railroad, (decided June 3, 1929, Oct. Term 1928, No. 129).

The typical "constructive receipt" case is one where a lessor of property provides in his lease for direct pay-

ments by the lessee to creditors or stockholders of the lessor in lieu of ordinary rental payments to the lessor. Most of the cases cited by petitioner are of this class. Such is the *Boston & Maine Railroad* case, above cited, in which the Court held that a lessor of railroad properties was subject to tax upon the amount paid by the lessee, pursuant to provisions of the lease, to the federal government on account of income taxes of the lessor. The *Old Colony Trust Company* case above cited differed in that it was not a lease case, but was a case in which an employer, pursuant to contract of employment with its employee, paid the federal income taxes of the employee directly to the government. In each of these cases the person or corporation whose taxes had been paid was held to have realized income to the extent of the payments made for his or its account on the theory that such payments had been constructively received.

It is to be noted in all these cases that the taxpayer held to have constructively received income did receive an equivalent benefit which could be exactly measured in terms of the amount of money paid by the other party to the transaction. Thus in the *Boston and Maine Railroad* and *Old Colony Trust Company* cases the taxpayer in question had his or its liability for income taxes reduced by exactly the amount which such taxpayer was held later to have constructively received. The same is true where a lessor has moneys paid to its bondholders or other creditors by the lessee. As a practical matter the same thing is true where a lessor has the lessee make payments direct to the lessor's stockholders. In such cases the duty of the lessor to pay dividends to its stockholders, which is a real

business duty, if not always a legally binding one, is performed for it, and the extent to which it has discharged such duty is accurately measured by the amount paid to its stockholders.

There is no such situation in the present case. The receipt by respondent's wife of one-half of his earnings is not a benefit to respondent which is even roughly equivalent to the amount so received by his wife. Indeed it is no benefit to him at all, except possibly in so far as it may displace his obligation to provide her with support—a benefit incapable of close measurement. In fact, his benefit from the contract cannot be accurately measured by the income which she receives. The only way in which his benefit can be accurately measured is to tax him upon his one-half of all of *her* income in accordance with the terms of the contract between them. The question of the taxation of such income is not involved in this case.

(d) The argument that an assignment of future earnings operates only to give a right enforceable in equity is inapplicable because this is not the case of an ordinary assignment of future earnings; but if the argument did apply it would be ineffective because the proper person to be taxed for income taxes is the equitable owner of the income.

We are quite willing to admit, as argued by petitioner, that under California law an assignment of future wages does not operate to pass a legal title thereto *in praesenti*, but only creates an equitable title which can be enforced in a court of equity as and when the wages come into existence. See

Cox v. Hughes, 10 Cal. App. 553, and
Bridge v. Kedon, 163 Cal. 493.

As a last argument petitioner refers to this principle, claiming that it prevents the treatment of any of respondent's earnings as taxable to his wife. However, as we have already pointed out, this case is *sui generis*. It does not involve the kind of assignment of future wages for the purpose of obtaining present credit which is contemplated in the California code sections providing that a mere possibility not coupled with an interest cannot be transferred at law, and which is considered in the authorities holding that such a possibility can be assigned only in equity. This is the case of an agreement between a husband and wife as to their property relations, and the method whereby they and each of them will receive and hold property. As such it has the special sanction of Civil Code Sections 158 and 161, already referred to, and of the authorities cited by the Circuit Court of Appeals in its opinion. These authorities hold very clearly that such an agreement does affect future earnings and gives the husband or wife, as the case may be, to whom such earnings are allotted by the agreement, the right to sue a third party for the earnings and to recover in such suit, although they have not yet been received by the earner. See especially

Wren v. Wren, 100 Cal. 276, and
Kaltschmidt v. Weber, 145 Cal. 596.

In other words, the special code treatment of such an agreement as this takes it out of the class of ordinary assignments of future earnings so that any argument based upon the rules applicable to such assignments is beside the point.

However, if the ordinary rule as to assignments of future earnings—to the effect that they are enforceable only in equity—does apply to this case, we do not see how that alters the situation for income tax purposes. Aside from the fact that the distinction between law and equity has been largely abolished in California, the federal tax laws have been and should be construed as levying the income tax upon the equitable owner of income, who is the real beneficial owner, rather that upon the person who merely holds legal title. Thus in the case of a trustee the tax law provides that although he must return the gross income of the trust in a special trustee's return, he is allowed to deduct any income of the trust which is to be distributed currently to the benficiaries, and the beneficiaries themselves are taxable upon such income. See

1928 *Revenue Act*, Section 162(b) and (c).

Furthermore, even when such income is not currently to be distributed to the beneficiaries, and is thus treated as income of the trustee, it is not added to the trustee's own personal income, but is separately reported by him on a trust return, and he is, of course, allowed to pay the tax out of the trust funds, so that it is in the end paid by the beneficiaries or equitable owners.

The case of a partnership, already mentioned, is similar. One member of a firm of three who share profits equally may receive a check for fees payable to him personally. He is thus the legal owner of that income, but under the partnership agreement the proceeds of the check must be divided equally between the partners, and accordingly the

income tax law taxes each of the partners upon the one-third of this check (assuming it to represent net income). In other words, the income tax law taxes the equitable or beneficial owner as determined by the partnership agreement.

In every case where the question is which one of two or more parties is responsible for the tax on certain income, the test to be applied is, who is it who actually gets the income in beneficial ownership and enjoyment? He is the one whom it is the object of the law to tax. This is the rule as applied by the courts. There is no distinction in principle between the present case and such cases as

O'Malley-Keyes v. Eaton, 24 F. (2d) 436;
Young v. Gnichtel, 28 F. (2d) 789;
Bowers v. New York Trust Co., 9 F. (2d) 548.

In the first of these cases, *O'Malley-Keyes v. Eaton*, the plaintiff was beneficially entitled to the income of a certain trust created under the will of her great grandfather. In 1921 she executed an instrument transferring and assigning all her right to the future income of the trust to a trust company for the benefit of her children and thereafter such income was paid to the trust company for her children and she received none of it. The Treasury Department ruled that the transfer did not operate *in praesenti* and that the income accruing must be deemed to be received first by the plaintiff and then to pass to the trust company for the benefit of her children, and upon this theory endeavored to tax the income as though

received by her. The court rejected this as a fiction wholly unsound, saying (p. 437):

> "After all, the stark *fact* is that the plaintiff did not receive this income, and cannot receive this income. To say that she did receive it is to indulge in a deliberate fiction. Suppose that she had never assigned her interest, and suppose, further, that she deliberately declined to accept any income from her great grandfather's estate; could we say that the income was received by her and tax her accordingly, in spite of the fact that we concede that she did not receive it at all?"

In the second case mentioned, *Young v. Gnichtel*, the plaintiff was entitled during her lifetime to one-third of the income from a trust created by her father's will. In 1922 she assigned out of this income an annual income to her husband of $9,000 and to each of her children of $2,500. Again the Treasury Department ruled that notwithstanding the assignment the income should be deemed to have been all received by and be taxable to the plaintiff before any portion of it passed to her husband and children. But again the court rejected this line of reasoning as pure fiction and held that the real fact was that after the assignment the portion of the income assigned to her husband and to each of her children was their income and not hers and was properly taxable as their income and not as hers.

In the third case, *Bowers v. New York Trust Company*, the principle was applied to an income from personal services rendered by a partnership. One Cannon followed the business of acting as an agent on commission for

cotton mills. Among his clients were certain mills, known as the "Cannon Mills", in which he or his family had a controlling interest. Later he formed a partnership and transferred his commission business to it and made certain arrangements with the partnership the upshot of which was that, as to three of the "Cannon Mills", the commissions that would otherwise be payable by them to the partnership for its services should be paid to certain members of Cannon's family. As in the *O'Malley* and *Young* cases, the Treasury Department ruled that the commissions from these three mills should be deemed to be received by the partnership for whose services they were paid and then to pass from the partnership to the members of Cannon's family, and that therefore they should be deemed partnership income and taxable as such. The court, however, overruled this contention and held that the commissions so paid the members of Cannon's family, although paid for services rendered by the partnership, were not taxable to the partnership since it had no beneficial interest in them.

If the test applied in these cases,—the test which we submit is the final test that should be applied in determining who shall pay the tax upon certain income,—is applied to the present case, no doubt can remain. The beneficial owner of the income resulting from the petitioner's personal services is not himself alone, but himself and his wife as joint tenants. Upon that basis, as the basis which in fact really exists, the income should be taxed. It is upon such basis that the Circuit Court of Appeals decided this case as it did. We submit, therefore, that the

judgment of that court should stand, and the petition for certiorari should be dismissed.

Respectfully submitted,

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Dated: San Francisco, California,
June 28, 1929.

(APPENDIX FOLLOWS.)

Appendix A.

CALIFORNIA CIVIL CODE SECTIONS CITED OR REFERRED TO.

SEC. 158. *Husband and wife may make contracts.* Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.

SEC. 159. *Husband and Wife. Property Relations.* A husband an wife cannot, by any contract with each other, alter their legal relations, except as to property, and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation.

SEC. 160. *Consideration for agreement of separation.* The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section.

SEC. 161. *May be joint tenants, etc.* A husband and wife may hold property as joint tenants, tenants in common, or as community property.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, as Commissioner of Internal Revenue,
Petitioner,

vs.

GUY C. EARL,
Respondent.

BRIEF FOR RESPONDENT.

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REGULATIONS OF THE TREASURY DEPARTMENT

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No. 99

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, as Commissioner of Internal Revenue,
Petitioner,

vs.

GUY C. EARL,
Respondent.

BRIEF FOR RESPONDENT.

I.

STATEMENT OF THE CASE.

In 1901, long before the Federal Income Tax law was passed, the respondent and his wife made an agreement in writing whereby all of the property of both should thereafter be held by them in joint tenancy. The agreement covered both the property the parties then had and also any they might thereafter acquire. As to the latter, the provision of the agreement is that all after-acquired property, including the earnings of either spouse, "shall be treated and considered and hereby is declared

to be *received*, held, *taken* and owned by us as joint tenants and not otherwise, with the right of survivorship." The clear purpose of the parties was to provide that it should be a legal incident of their relation as husband and wife that all their property should have the character of their joint property.

The agreement has never been abrogated either expressly or by failure to comply with its terms. On the contrary it has been consistently observed and followed by the parties ever since it was made. The question in the case is whether, in view of this agreement, income derived in after years from the earnings of the husband should be considered for tax purposes as exclusively his income or as the joint income of him and his wife.

II.

THE VALIDITY AND OPERATION UNDER THE CALIFORNIA LAW OF THE AGREEMENT BETWEEN THE RESPONDENT AND HIS WIFE.

The validity and operation of the agreement are of necessity determined by the law of California where the agreement was made and where the parties have at all times resided.

The agreement is one specifically authorized by statute in that State. Chapter III, Provision 1, Part 3, Title 1, of the California Civil Code, entitled "Husband and Wife", fixes the incidents which attach or pertain to the marital relation, such as the respective rights and duties of the parties. Among other things, it fixes their prop-

erty rights. Their property rights as so fixed are in general those of what is known as the community property system.

But husbands and wives are expressly permitted by the same Code sections that establish the community property system to change by agreement between them the incidents as to property which attach or pertain to their relation.

Section 159 of the Code says:

> "A husband and wife cannot by any contract with each other alter their legal relations except as to property."

Section 161, before its recent amendment long after the present controversy arose, read:

> "A husband and wife may hold property as joint tenants, tenants in common, or as community property."

Section 158 of the Code reads:

> "Either husband or wife may enter into any engagement or transaction with the other * * * respecting property, which either might if unmarried."

The Supreme Court of California has held that under these Code sections the mutual consent of the parties is alone a sufficient consideration for an agreement between husband and wife changing the incidents of their relation as to property (*Wren v. Wren*, 100 Cal. 276, 279). There can be no question therefore, and none is made, but that the agreement in the present case was a valid and binding one.

As to the effect of such an agreement, as to how it operates, the Supreme Court of California has also held that it operates to change the status of the property from what would have been its status under the community property system as established by the Code to that which the agreement between the parties provides. This is illustrated in *Wren v. Wren*, just referred to. Under the California law the earnings of a married woman are not her property but are community property, exactly as are the earnings of the husband, and therefore an action for the recovery of such earnings must be brought by the husband and cannot be brought by the wife. In *Wren v. Wren*, a married woman brought in her own name an action to recover for personal services rendered by her to the defendant, and in order to show her right to maintain such an action alleged in her complaint that *prior to the rendition of the services* she and her husband had orally agreed that what was received because of such services should be her separate property. The defendant objected to her right to maintain the action, contending that the agreement did not have the effect of giving her a cause of action for the reason that the relinquishment by the husband of his right to her earnings was by way of gift and that future earnings, something not yet in existence, could not be the subject of an oral gift. To this contention the Supreme Court of California replied that it did not view the agreement simply as one involving a gift, that the Code permitted the parties by agreement to alter their legal relations as to property and that the effect of the agreement was to make the future earnings of the wife her separate property. It was held accord-

ingly that the cause of action for the recovery of her earnings was her cause of action.

Again, in a very similar case,

Kaltschmidt v. Weber, 145 Cal. 596,

the Supreme Court of California said (p. 599):

> "And so also he (the husband) may under sections 158 and 159 of the Civil Code, contract with her (his wife) by an agreement that her personal earnings shall be her separate property and this may apply to future as well as past earnings *and the effect of such an agreement will be to convert such earnings from the status of community property to that of separate property of the wife.*"

An even more striking illustration of the operation of such agreements between husband and wife under the California Code sections is afforded by

Perkins v. Sunset, etc. Company, 155 Cal. 712.

Under the California law a cause of action for personal injuries suffered by a married woman, is community property and an action for damages by reason of them must be brought by the husband (*Moody v. Southern Pacific Co.*, 167 Cal. 786). But in the *Perkins case* such an action was brought by the wife who made the claim that prior to her suffering the injuries she and her husband had made a general agreement that all community property should be her separate property and also that after her injuries her husband had relinquished to her all interest in the particular cause of action by reason of them.

The rule generally prevalent elsewhere prevails in California that a cause of action for personal injuries

cannot be assigned even after it has arisen, much less in advance of its arising. The defendant contended that this rule precluded the husband from transferring the cause of action to his wife and on this ground sought to reverse the judgment rendered in favor of the wife by the trial court. The Supreme Court held, however, that no point of assignment or transfer was involved, that under the Code sections as they had been construed by the courts the effect or operation of the agreement between the plaintiff and her husband was to change the status of after-acquired property from community into her separate property so that the cause of action was her separate property when it arose and she could maintain an action upon it and the judgment in her favor was a proper one.

While *Wren v. Wren* and *Kaltschmidt v. Weber*, to which we have referred, are both cases where by agreement the earnings of the wife were to be her separate property, it would seem hardly to require the citation of authority to show that the same effect should be given to agreements, such as the one now before the Court, changing the status of earnings of the husband. Under the California law the earnings of either spouse, while they are living together, are community property and subject to the control and beneficial enjoyment of the husband. There is no difference whatever between them. This being true, it would seem to follow necessarily that an agreement between husband and wife changing the status of the husband's earnings, would have exactly the same effect as a similar agreement as to the wife's earnings. But if there be any doubt about the matter, it in

turn is settled by the decision of the California Supreme Court in

Cullen v. Bisbee, 68 Cal. 695.

There a married woman brought suit upon a promissory note and the defense was made that the note was not her property but community property and therefore the property of her husband. The note was one given to her during coverture and in return for future services to be rendered, not only by her, but by her husband as well. If those future services were community property, the note given for them was necessarily community property and the defense was good. It appeared, however, that prior to the rendition of the services the plaintiff and her husband had agreed that the note to be given in consideration of them should be her separate property. The court held that this agreement was effective, that it made, not only her future personal services, but her husband's future personal services as well, her separate property, and that therefore the promissory note received by her in consideration of such services to be rendered was her separate property. The language of the court is (italics ours):

> "The effect of the transaction and the circumstances attending it were that Cullen (the plaintiff's husband) prior to the execution of the note made a gift to his wife of her future services in performance of the contract *and of his own services as well.* It is settled that this is a valid transaction between them under the sections of the Code above cited. (Sections 158, 159, 160, C. C.) *Wren v. Wren,* 100 Cal. 279, *Kaltschmidt v. Weber,* 145 Cal. 599. The consequence of this gift is that the consideration of the note (i. e., the services of both the plaintiff and her husband) was the separate property of the wife."

The effect or manner of operation of such agreements between husband and wife as the one now before the court is then something that has been definitely and certainly established. It is that under the permission given by the Code sections husbands and wives may, in California, by agreement, substitute for those legal incidents as to property which the statute attaches to their marital relations in the absence of an agreement, such incidents as they may agree upon. The agreement takes the place of the statute as fixing the property incidents of their relation and those incidents are determined and given effect exactly as if they were prescribed by a statute instead of by an agreement. They are in fact prescribed by statute since the statute as construed says that if the parties make an agreement as to the property incidents of their marriage relation, such an agreement shall govern and their property rights be as prescribed by it.

III.

IT NECESSARILY FOLLOWS FROM THE MANNER IN WHICH THE AGREEMENT BETWEEN THE RESPONDENT AND HIS WIFE OPERATES UNDER THE CALIFORNIA LAW THAT THE INCOME OF BOTH, INCLUDING THE PERSONAL EARNINGS OF BOTH, IS TO BE TAXED AS THE JOINT INCOME OF BOTH, AND NOT AS COMMUNITY PROPERTY.

Two things follow as necessary results of the agreement between the respondent and his wife operating in lieu of or by way of substitution for the statute. The first is that after-acquired property has from the very beginning the status or character agreed upon by the parties. Not

only is this a necessary result logically but the State Supreme Court has declared such to be the law. It must be taken therefore that in this case the after-acquired earnings of the husband had from the very beginning the status or character of joint property and never had the status or character of property acquired or held by the husband as his separate property or as community property.

The second result is that it is wholly immaterial that the property rights of the respondent and his wife are those prescribed by agreement and not by statute. The agreement is the equivalent and has the effect of a statute.

So viewing the case, the answer to the question which is now presented to the Court would seem to be clear. The case is one of income received and held by husband and wife as joint tenants. They so receive and hold it as an incident of their marriage relation. It follows that it should be considered as such for income tax purposes. This is certainly true unless there be a distinction between income derived from personal earnings and other income. But neither the California law nor the Federal Tax law make any such distinction. The California law makes the income of the respondent from his personal earnings the joint property of him and his wife in the same manner as all other income and the Federal law taxes income according to its character under the local law as community or separate, or joint income, without distinction between income from personal services and other income.

All this seems perfectly simple and perfectly clear but if anything is needed to further clarify it, it can be had by assuming that in this case the California statute expressly provided that all income of either husband and wife, including the personal earnings of either, should be the joint property of both. No one would think of questioning that under a statute so fixing the property incidents of the marital relation in California, all the income of both spouses from every source would be joint income and taxable as such. But that is exactly this case. The California statute, as construed by the Supreme Court of that state, prescribes that if husband and wife agree upon the property rights incident to their relation, the rights actually incident by law to the relation shall be those agreed upon. In this case the parties have so agreed and the effect and operation of the agreement is exactly that of a statute framed in the words of the agreement.

IV.

THE BASIC PRINCIPLE OF THE INCOME TAX LAW IS THAT IT IS A TAX ON INCOME BENEFICIALLY RECEIVED. APPLYING THIS PRINCIPLE THE INCOME IN THIS CASE MUST BE TAXED AS THE JOINT INCOME OF THE RESPONDENT AND HIS WIFE.

Regardless of all technical considerations as to just how the agreement between the respondent and his wife operated upon his subsequent earnings, there can be no doubt that the agreement was effective to prevent the respondent from receiving or at any time holding his earnings as their exclusive beneficial owner. It is clear

that the beneficial ownership of the respondent's earnings was at all times in him and his wife jointly. This simple fact is not questioned by the Government and cannot be and it would seem to be decisive.

The basic idea of the Income Tax law is that it is a tax on incomes beneficially received. This is the economic justification for the law. It is the idea upon which primarily its provisions have been drawn. For example, the tax is not on incomes as such, that is, on all income, but on net income alone. The idea of net income is beneficial gain to the taxpayer.

The same idea is found in the provisions respecting income of trustees. The tax is not on the income of the trustee or trustees but on the income of the beneficiaries under the trust. The share of each beneficiary in the trust income is taxed only as a part of his individual income. There are exceptions to this in certain cases, but those cases are of a character which emphasizes the fact that they are exceptions and that the general principle upon which the act proceeds is that it is income beneficially received that is the subject of the tax.

The same idea underlies the provisions that partnerships shall not pay an income tax on their income but each partner must pay a tax on his share of the partnership income as a part of his income beneficially received.

The same idea underlies the provisions that corporations shall pay a certain rate of tax on their incomes but no surtax and that stockholders shall not pay the normal income tax on corporation dividends but for the purpose of the surtax shall include such dividends in their individ-

ual incomes. It is recognized that while a corporation is a legal entity, the real beneficiaries of its income are its stockholders. Accordingly the stockholders are relieved from paying the normal tax on dividends received since that tax is in effect paid by the corporation, and, on the other hand, since the corporation pays no surtax, the dividends are taken into account in determining the surtaxes of the individual stockholders.

Such being the primary purpose of the statute it would seem that in every case where the question arises regarding some certain income or item of income, "Whose income is it for tax purposes?" the touch-stone to be applied is, "Whose income is it beneficially?" It is certainly *not* in accord with the purpose of the Act that anyone should pay a tax upon income he does not beneficially receive, either actually or potentially. It certainly *is* in accord with the purpose of the Act that everyone should pay a tax upon income that he does beneficially receive, either actually or potentially.

It is the touch-stone which this Court has itself applied to such cases. If we read correctly *United States v. Robbins*, 269 U. S. 315, in which it was decided that as between husband and wife the community income under the community property system of California was to be taxed as the income of the husband and not as the income of husband and wife, the fundamental fact upon which the court proceeded was that the husband, in spite of certain restrictions upon his exclusive power over community property, had the disposal and beneficial enjoyment of it.

It is certainly the touch-stone which this Court applied in *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716. There an employer, as a part of its engagement with an employee, agreed to pay the income tax upon the latter's salary. The question presented to the court was whether or not the amount of the tax which the employer so agreed to pay should for the purposes of the tax be added to the employee's salary as part of the latter's income. It was held that it should be. It was so held upon the ground that while the employee did not actually receive the amount of the tax he did receive it in effect since it went to the discharge of a burden resting upon him, since, in other words, he had the benefit of it.

If this touch-stone be applied to the present case, it is decisive. There is no doubt that the income here involved was not received beneficially in its entirety by the respondent but was so received by both the respondent and his wife as joint tenants.

V.

THE REASONS ADVANCED BY COUNSEL FOR THE GOVERNMENT WHY THE INCOME INVOLVED SHOULD NOT BE TAXED ACCORDING TO THE CHARACTER IN WHICH THE SAME WAS RECEIVED BOTH LEGALLY AND BENEFICIALLY.

It being clear that under the agreement between the respondent and his wife his subsequent earnings were not in their entirety beneficially received and held by him but were so received and held by him and his wife as joint

tenants, and it being clear as well that under the California law the effect of the agreement was to make his earnings as they accrued joint property of himself and his wife instead of community property, what are the reasons advanced on behalf of the Government why the income should not be taxed as joint income but as the income exclusively of the respondent?

(a) The Reason Advanced in the Lower Court.

The reason advanced in the lower court was not the same as that now advanced in the brief before this Court. The reason advanced in the lower court was primarily that the effect of the agreement was only that of an equitable assignment, that the earnings of the respondent were in the first instance his property alone and that it was only after he received them that the agreement operated to give his wife an interest in them, that accordingly at the moment of their receipt there was an instant of time in which the legal title to the earnings vested in the husband alone and that therefore they were subject to tax as a part of his income.

This line of reasoning or argument flies directly in the face of the decisions of the Supreme Court of California as to the effect of such agreements between husband and wife. Those decisions, as we have pointed out, hold that such agreements do not operate by way of assignment but by way of establishing the incidents as to property which attach to the relation of husband and wife so that as to after-acquired property they do not operate by way of changing the character or status of the property after it is acquired but operate to fix the character or status in which it is acquired.

The line of reasoning or argument on behalf of the Government in the court below also ignores the very apparent fact, that even if it were true that the agreement operated by way of an equitable assignment and there was at the moment of the receipt of the property an instant of time when the husband held it as exclusively his own, he would so hold it only as a naked trustee. In ignoring this fact the argument flies directly in the face of the basic principle or purpose of the income tax law to tax income beneficially received and likewise in the face of the particular rule that income received as a trustee is taxable not as income of the trustee but as income of the beneficiary.

O'Malley-Keyes v. Eaton, 24 Fed. (2d) 436;
Young v. Guichtel, 28 Fed. (2d) 789;
Bowers v. New York Trust Co., 9 Fed. (2d) 548.

It likewise flies directly in the face of the repeated ruling of the Board of Tax Appeals that under the community property system, in a case where husband and wife agree that the latter's earnings are to be her separate property, the earnings of the wife are to be taxed as part of her income and not as a part of her husband's.

Louis Gassner, 4 B. T. A. 1071;
E. C. Busche, 10 B. T. A. 1345;
Francis Krull, 10 B. T. A. 1096;
Allen Harris, 10 B. T. A. 1374.

We understand these rulings have been acquiesced in by the Government. But under the community property system of California the earnings of the wife while the parties are living together are in exactly the same category as earnings of the husband. There is no distinction whatever

between them. Both are community income. If an agreement between husband and wife may change the status of the earnings of one for income tax purposes, there is no possible reason why it should not similarly operate to change the status of the earnings of the other.

(b) The Reason Advanced in This Court.

The brief of the Government in this Court does not advance the claim made in the court below as to the manner in which such agreements as the one before the Court operate. Presumably it does not do so because counsel have realized that the claim is directly opposed to the rulings of the State Supreme Court and that, because such rulings are rulings as to the local law, they are binding on the Federal courts.

Instead, the claim is now advanced that it was the purpose of Congress, as expressed in the Income Tax law,

> "that salaries, wages and compensation for personal services are to be taxed as an entirety and therefore must be returned by the individual who has performed the services which produced the gain" (Brief for the Petitioner, p. 6).

This claim is the sum and substance of the brief for the Government before this Court. No other argument or contention to support the position of the Government is advanced.

The claim is one that is without support either in the language of the Act or in the decisions of the courts construing it. Not only this, but it is directly opposed to provisions of the Act and to regulations of the Treasury Department which either prescribe or permit that com-

pensation for personal services be not taxed as an entirety and be not returned by the individual performing the services.

The only language of the income tax law to which counsel refer in support of their position as to its meaning is that of Section 213, as to which they say:

> "Section 213 defines gross income and includes therein 'gains, profits and income derived from salaries, wages or compensation for personal services'."

Counsel do not explain how this language supports the contention either that compensation for personal services is to be taxed as an entirety in a case where it is not beneficially received as an entirety, or that compensation for personal services must be returned by the individual who performed the services in a case where such individual is not the person who beneficially receives it. Their argument as set forth in their brief consists practically in the bald assertion that the language of the Act just quoted above supports their position. We do not follow them. To us just the contrary seems clear.

It is to be noted that by the language of the Act it is not "salaries, wages or compensation for personal service" that are to be included in gross income. That which is to be included is "gains, profits and income derived" from salaries, wages or compensation for personal service. Since it is not the salary, the wage or the compensation that is to be included, but only the gain, profit or income that may be derived therefrom, it would seem plain that salaries, wages or compensation for personal service are not to be taxed as an entirety unless in their entirety they

are gains, profits and income. Since, also, it is the gain, profit or income to the individual that is to be taxed, it would seem plain that it is only the amount of such salaries, wages or compensation as is gain, profit or income to the individual, that is, such amount as the individual beneficially receives, for which he is to be taxed.

These conclusions as to the meaning of the Act are made even plainer when the language quoted and relied upon by counsel for the Government is read in its context. Omitting certain immaterial portions, Section 213, as in effect for the years involved here, read:

> "For the purposes of this Title * * * the term 'gross income'
>
> (a) Includes gains, profits and income derived from salaries, wages or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer * * *."

It will be noted at once that no distinction is made between "gains, profits and income" which are derived from personal earnings and those which are derived from other sources, derived as rents, for example, from real property. So far as the text indicates, one is to be taxed exactly as the other. Unless "gains, profits and income" from other sources are to be taxed as an entirety, regard-

less of how they are beneficially received, there can certainly be no inference that "gains, profits and income" from earnings for personal service are to be so taxed. But it is manifest that "gains, profits or income" from other sources are not to be so taxed. It would hardly be claimed that rent payable under a lease to two persons, either separately or jointly or to one of them for the benefit of both, should be taxed as an entirety and not as divided between them in accordance with their beneficial interests.

The fair inference from the text of the Act is, we submit, that "gains, profits and income" from whatever source are to be taxed alike and that they are to be taxed to the individuals who get a gain, profit or income and to the extent of the respective gain, profit or income of such individuals, in other words, in accord with their beneficial interests.

We have stated that the contention of counsel is directly opposed to provisions of the Act. So far as we are aware, in every case where the Act deals with compensation for personal service which is not in its entirety beneficially received by the person performing the service, the provision is that it shall be taxed as the income of those who beneficially receive it and in the amounts in which they beneficially receive it. This would seem to be decisive as to the purpose of the Act.

The outstanding instance of compensation which is not beneficially received in its entirety by the person rendering the service is that of service rendered by a member of a personal service partnership, a member of a law firm, for

example. The compensation for services so rendered is not taxable in its entirety either as part of the income of the firm or as a part of the income of the particular partner rendering the service. It is not even taxable directly. It is taxable only indirectly to the extent to which it enters into and forms a part of the net earnings of the firm. It is only the share of each partner in the net earnings, that is, his beneficial interest, that is subject to the tax. The income upon which a partner in such a firm is required by the law to pay a tax has no necessary relation whatever to the compensation that may have been received for personal service rendered by him. The income upon which he must pay a tax is determined exclusively by his beneficial interest in the income of the firm. Even if a partner in such a firm performed no service at all, had retired, for example, yet if he had an interest in the earnings of the firm he would be taxable for such interest and his partners would not be.

Exactly the same thing was true as to personal service corporations under the Income Tax law in effect in the years 1920 and 1921, the years involved here. Section 218, subd. (e) of both the Act of 1918 and the Act of 1921, provide:

> "Personal service corporations shall not be subject to taxation under this Title but the individual stockholders thereof shall be taxed in the same manner as the members of partnerships."

Another striking instance where compensation for personal service is not taxable as income of the person rendering the service is that of the earnings of either husband or wife under the community property system. In Cali-

fornia, since its community property law was changed in 1927, and in other community property states both before and since that time, husbands and wives may under the Regulations of the Treasury (Art. 31, Regulations 45 and 62) render separate tax returns and may each report as gross income one-half of the community income. This applies to the earnings of the spouses as well as to other community income. The regulation is manifestly based on the fact that the wife, under the community property system, is taken to have a one-half interest in the community property and in the community income. In other words, in such instances neither the earnings of the husband nor of the wife are taxable in their entirety. They are divided between husband and wife and taxed according to their respective beneficial interests.

Another illustration of the same thing is the taxation of the earnings, prior to 1917, of a married woman in California, living with her husband. Under the decision of this Court in *United States v. Robbins*, above referred to, all community income in that state had to be returned as the income of the husband. This included the earnings of a wife living with her husband. The result was that such earnings were not returnable in any amount as the earnings of the person rendering the service, that is, the wife, but as the earnings of the person who, as we read the decision of this Court, beneficially received them, that is, the husband.

We repeat our statement that the contention of counsel that it was the purpose of the Federal Tax Act to tax gains, profits and income derived from personal service as an entirety and that they should be included in the

return of the individual rendering the service, is wholly without support and is in fact contrary to the true purpose of the Act. That purpose, we submit, is plainly that taxable income from whatever source derived should be taxed to those persons who beneficially receive it and in the proportions in which they so receive it. If this be true, it is decisive of this case for it is not questioned and cannot be questioned that the income in controversy here was beneficially received by the respondent and his wife jointly and not by the respondent exclusively.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 99.—October Term, 1929.

Robert H. Lucas, Commissioner of Internal Revenue, Petitioner, vs. Guy C. Earl. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 17, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

This case presents the question whether the respondent, Earl, could be taxed for the whole of the salary and attorney's fees earned by him in the years 1920 and 1921, or should be taxed for only a half of them in view of a contract with his wife which we shall mention. The Commissioner of Internal Revenue and the Board of Tax Appeals imposed a tax upon the whole, but their decision was reversed by the Circuit Court of Appeals, 30 F. (2d) 898. A writ of certiorari was granted by this Court.

By the contract, made in 1901, Earl and his wife agreed "that any property either of us now has or may hereafter acquire . . . in any way, either by earnings (including salaries, fees, etc.), or any rights by contract or otherwise, during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise, or inheritance, and all the proceeds, issues, and profits of any and all such property shall be treated and considered, and hereby is declared to be received, held, taken, and owned by us as joint tenants, and not otherwise, with the right of survivorship". The validity of the contract is not questioned, and we assume it to be unquestionable under the law of the State of California, in which the parties lived. Nevertheless we are of opinion that the Commissioner and Board of Tax Appeals were right.

The Revenue Act of 1918 approved February 24, 1919, c. 18, §§ 210, 211, 212 (a), 213 (a), 40 Stat. 1057, 1062, 1064, 1065, imposes a tax upon the net income of every individual including

"income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid," § 213 (a). The provisions of the Revenue Act of 1921, c. 136, 42 Stat. 227, in sections bearing the same numbers are similar to those of the above. A very forcible argument is presented to the effect that the statute seeks to tax only income beneficially received, and that taking the question more technically the salary and fees became the joint property of Earl and his wife on the very first instant on which they were received. We well might hesitate upon the latter proposition, because however the matter might stand between husband and wife he was the only party to the contracts by which the salary and fees were earned, and it is somewhat hard to say that the last step in the performance of those contracts could be taken by anyone but himself alone. But this case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act. There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.

Judgment reversed.

The CHIEF Justice took no part in this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.